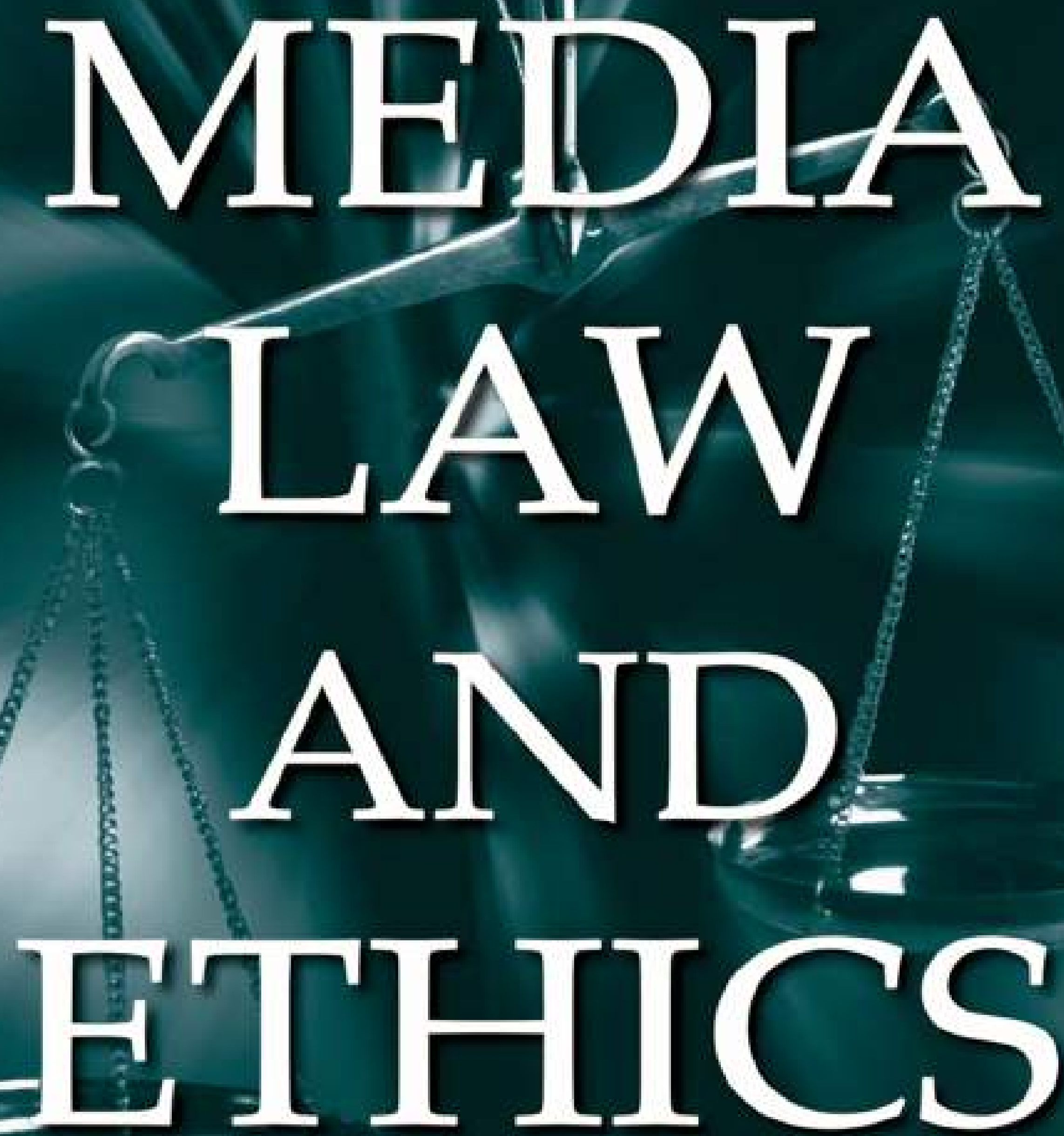
THIRD EDITION

MEDIA LAW AND ETHICS



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CHAPTER

6

Corporate and Commercial Speech

Once in a great while, the U.S. Supreme Court grants certiorari in a case that both sides anticipate will lead to a decision that will significantly alter the First Amendment landscape. *Nike v. Kasky* (2003) was such a case. It began in the mid-1990s when Nike came under fire from critics after news stories in several media outlets claimed that some of firm's athletic shoes and apparel were manufactured in sweat shops in China, Vietnam, and other Asian countries.[1] The reports pointed to allegedly adverse work conditions in the factories, including low wages, poor safety, verbal and sexual abuse, and exposure to toxic chemicals. The company, known worldwide for its "swoosh" and "Just Do It" trademarks, fought back with a massive publicity campaign that included press releases, a Web site, full-page newspaper ads, and letters to newspapers, university presidents, and athletic directors. None of the publicity attempted to directly sell any of Nike's products. Instead, Nike vigorously tried to counter the accusations by arguing that its products were made in safe and comfortable work environments and that employees were paid fair wages.

Mark Kasky, a consumer and labor activist, filed suit against Nike, using a California law, known as the "private attorney general" rule[2] that allows a state resident to sue as a representative of all consumers in the state. Kasky claimed that some of Nike's statements in its press releases constituted false advertising and unfair trade practice even though all of Nike's statements were made outside of any direct product advertising. He argued that Nike should be held liable even though he acknowledged in his complaint that he had not purchased any Nike products as a result of the publicity and that he had not been harmed by any of Nike's statements. He also argued that the statements, although not part of a product advertising campaign, were aimed not only at countering criticism but also at influencing consumers who purchased or might purchase the company's products. The purpose of this argument was to convince the courts that Nike had engaged in commercial speech,

which, as you will see later in this chapter, has substantially less protection under the First Amendment than political, religious, and other types of speech.

Kasky lost in the state trial court. The court dismissed the lawsuit, holding that Nike's speech was not commercial and thus deserved full First Amendment protection. The dismissal was upheld by the state Court of Appeal. On further appeal, the California Supreme Court overturned the lower court's decision in a 4 to 3 ruling that characterized Nike's campaign as commercial speech.[3] The state Supreme Court disagreed with Nike that its campaign had full First Amendment protection because it was part of an international debate on issues of strong public concern. According to the court, Nike's campaign included "factual statements about how Nike makes its products."[4] The court said:

> Our holding, based on decisions of the United States Supreme Court, in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices. It means only that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully.[5]

Some 40 media organizations, including the Reporters Committee for Freedom of the Press, begged to differ with the state Supreme Court, filing a friend-of-the-court brief with the Court when the decision was appealed. They argued that, if upheld, the *Nike* decision would have a "chilling effect" on similar speech.[6]

The U.S. Supreme Court granted *certiorari* and heard oral arguments on April 23, 2003. There were hints of what was to come in the oral arguments that often focused on whether the Court should be hearing the case in the first place since it had never gone to trial.

In June the Court ruled in an unsigned *per curiam* opinion that the writ for certiorari had been "improvidently granted."[7] That decision effectively sent the case back to the trial court. Less than three months later, Nike settled out of court with Kasky by agreeing to pay the Fair Labor Association (FLA) $1.5 million over three years to fund programs aimed at improving workplace conditions.[8] FLA is a nonprofit coalition of 12 companies including Nike and 185 colleges and universities formed to "promote adherence to international labor standards and improve working conditions worldwide."[9] The case many thought would go a long way toward clarifying the definition of commercial speech ended with a whimper rather than a bang.

The U.S. Supreme Court's nondecision in *Nike* in many ways reflects the struggle of the Court over the years to articulate clear guidelines regarding how much protection commercial speech enjoys. Nevertheless, corporate and commercial speech remains a huge business in the United States just as it is in many other countries, and in any big industry, the possibility of abuse of the public trust is always present. Advertising and other forms of commercial speech are no exception.

Since the days of patent medicines and elixirs that promised cures for ailments from indigestion to baldness in the late 19th and early 20th centuries, there has been concern about false, deceptive, and fraudulent ads. That concern on the part of the

government and the public was never translated into regulation until Congress created the Federal Trade Commission in 1914. Many years later, the FTC attempted to regulate advertising. Today the commission is a prime regulator of commercial speech, although myriad other federal and state agencies are also involved.

This chapter focuses on the regulation of corporate and commercial speech, including advertising, and the development of the "commercial speech doctrine" in the U.S. Supreme Court. The analysis begins with Supreme Court decisions on commercial speech and moves to state and federal restrictions on advertising and other forms of corporate and commercial speech.

The Development of the Commercial Speech Doctrine

As the outcome in the *Nike* case illustrates, the U.S. Supreme Court and other courts struggle with drawing the limits for protection for commercial speech. In fact, the history of involvement of the courts in commercial speech issues is much like a patchwork quilt—myriad confusing and contradictory components that often make it difficult to discern trends and underlying principles. No distinctive evolution of constitutional law on commercial speech occurred. Instead, the U.S. Supreme Court, at least, has at times erratically switched from one principle to another, dependent on the individual circumstances of a particular case. The Court established specific tests for determining whether a particular type of commercial speech has constitutional protection, but these tests have not proved definitive.

In 1942, the first major U.S. Supreme Court case on commercial speech emerged. The public and governmental concern with massive anti-competitive trade practices and fraudulent marketing techniques including false and deceptive advertising at the start of the 20th century was channeled into federal legislation such as the Federal Trade Commission Act of 1914 and the Clayton Act of 1914. Such legislation forbade practices like price fixing and corporate mergers. Later, the Food, Drug and Cosmetic Act of 1938 outlawed the interstate transportation of adulterated or mislabeled foods, drugs, and cosmetics, rather than specifically regulating advertising. The prevailing assumption until the early 1940s was that commercial speech had First Amendment protection and thus could not be severely restricted.

Valentine v. Chrestensen (1942)

In 1942, the U.S. Supreme Court tackled head-on the issue of whether commercial speech enjoys First Amendment protection. In *Valentine v. Chrestensen*,[10] the Court held that the First Amendment does *not* apply to "purely commercial advertising." In 1940, F.J. Chrestensen, a Florida resident, moored his submarine formerly owned by the U.S. Navy at a state pier in the East River near New York City. While he was distributing handbills that advertised tours of the sub, the Police Commissioner of New York, Lewis J. Valentine, informed him he was violating a state sanitary code prohibiting distribution of commercial and business advertising on public streets.

Valentine told Chrestensen that it was permissible to distribute handbills devoted solely to information or public protest but not commercial handbills. The code effectively banned advertising but not political materials.

Chrestensen was not satisfied and cleverly printed a revision of the original on one side (omitting the admission fee). The other side had no advertising but criticized the City Dock Department for banning the original version of the handbill. The entrepreneur dutifully submitted the new handbill to the Police Commissioner but was rebuffed again. No problem, he was told, with handing out the protest information but no advertising. Chrestensen ignored the warnings, passed out the handbills and was expeditiously restrained by police. He then successfully sought an injunction in District Court for the Southern District of New York to prevent the police from further restraining him. The judge granted only an *interlocutory injunction*, a type of injunction that is effective only until the controversy can be settled on appeal. Thus the police could not prevent Chrestensen from distributing handbills until a higher appellate court made a decision on whether the statute was constitutional. The Second Circuit U.S. Court of Appeals upheld the district court decision.

On further appeal, though, the U.S. Supreme Court, in a decision written by Associate Justice Owen J. Roberts, unanimously reversed the lower court decree. According to the Court:

> This Court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.[11]

This decision that enunciates what became known later as the commercial speech doctrine was gradually chipped away over the decades, but it was accepted doctrine until the 1970s. Along the way, the Court attempted to distinguish commercial speech from noncommercial speech but generated more confusion than clarity.

From March through May 1943, the Court decided four cases involving door-to-door distribution of religious materials by Jehovah's Witnesses. Several First Amendment cases decided by the U.S. Supreme Court including one in 2003 involved this religious sect, always fervent in proselytizing, much to the chagrin of more traditional religious denominations. Anyone who grew up in the rural South or Southwest during the 1950s and 1960s may recall numerous occasions on which Witnesses would canvass the neighborhood door-to-door seeking contributions in return for their religious tracts. The Witnesses persisted in efforts despite having doors slammed in their faces and suffering verbal abuse from people who resented solicitations. They have also generated controversy over decades for their refusal—on religious grounds—to salute the American flag.

Jamison v. Texas (1943)

Such persistence often met resistance not only from unsympathetic residents but also by way of local ordinances and state statutes. *Jamison v. Texas* (1943)[12] is a prime example of the selective use of a city ordinance to restrict the activities of religious groups such as the Witnesses. Ella Jamison was convicted in a Texas court of violating a Dallas ordinance banning the distribution of handbills on public streets. She was fined $5 plus court costs for passing out Witness literature.

Under Texas law at that time, Jamison could not appeal the decision to a higher state court. She had to appeal directly to the U.S. Supreme Court, which granted certiorari. In a unanimous opinion written by Justice Hugo L. Black, the Court reversed the conviction on the ground that it violated her First and 14th Amendment rights of freedom of speech and freedom of religion. According to the Court, even though the handbills were on the face commercial, they were protected because of their religious content.

The state argued that *Valentine* should apply because the literature advertised religious books and other works. The Court held that the *Valentine* holding did not affect commercial religious materials of this type. "The mere presence of an advertisement of a religious work on a handbill of the sort distributed here may not subject the handbill to prohibition,"[13] the Court noted. The Court offered as rationale for this exception to the *Valentine* rule that the First Amendment was designed to protect this activity. The state cannot be permitted to ban distribution "merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes."

Murdock v. Pennsylvania (1943)

On May 3, 1943, the U.S. Supreme Court issued three separate decisions, all of which dealt with commercial speech and involved Jehovah's Witnesses. Taken together, the majority opinions substantially define the extent to which the state can regulate religious speech within a presumably commercial context. In *Murdock v. Pennsylvania* (1943),[14] the Court reversed the convictions of eight Witnesses for violating a Jeannette, Pennsylvania ordinance that permitted door-to-door sale of products only with a license that could be obtained only upon payment of a specified fee. No exception was made in the law for religious literature. Although they were not jailed, the eight were ordered to pay fines after they were convicted for violating the ordinance by requesting contributions for religious literature they peddled from door to door.

There was no question that they were guilty, but the defendants unsuccessfully argued before the trial court that the law violated First Amendment rights of freedom of press, speech and religion. On appeal, the Pennsylvania Superior Court and the state supreme court upheld the convictions.

The U.S. Supreme Court ruled in favor of the Witnesses in a 5 to 4 decision written by Associate Justice William O. Douglas. According to the majority, the Witnesses were involved in a religious, not a commercial, venture:

> The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books. . . .The taxes imposed by this ordinance can hardly help but be as severe and telling in their impact on the freedom of press and religion as the 'taxes on knowledge' at which the First Amendment was partly aimed.[15]

Martin v. City of Struthers (1943)

The second decision involved a violation of a similar city ordinance by a Jehovah's Witness, but the Supreme Court took a somewhat different tack in striking it down as unconstitutional. In *Martin v. City of Struthers* (1943),[16] the Court in another 5 to 4 split overturned the conviction of Thelma Martin for door-to-door distribution of leaflets advertising a Jehovah's Witness service. She was fined $10 for violating a Struthers, Ohio ordinance very similar to that in *Murdock*.

Two strange twists to this case contrasted it with *Murdock*. Martin's case was initially rejected on appeal to the U.S. Supreme Court because the justices mistakenly assumed that no constitutional issue had been raised in the lower courts. However, upon a motion for reconsideration, the Court granted a writ of certiorari on the ground that a constitutional question had arisen. The Ohio Supreme Court turned down Martin's appeal because the court concluded no constitutional issue was involved. In striking down the ordinance as a violation of the First and 14th Amendments, the Court also held that it infringed not only on the right of the disseminator of the information but also on the right of area households to receive the information.

The Court acknowledged the aggressiveness of sects such as the Witnesses in door-to-door soliciting. According to the Court, door-to-door solicitations can be regulated under certain conditions, but the law was too broad. The Court noted that an ordinance prohibiting solicitation of homes on which the owners had posted a sign or other notice asking not to be disturbed would be a possible way of overcoming the overreach of this particular law.

Douglas v. City of Jeannette (1943)

The third case, interestingly, garnered the unanimous opinion of the Supreme Court but the facts were somewhat different. In *Douglas v. City of Jeannette*,[17] the Court declared that a Jeannette, Pennsylvania ordinance banning the solicitation of orders for merchandise unless the individual had already obtained a license and paid a fee was unconstitutional. Two distinctions marking this case were that soliciting was

not door to door and the solicitation did not involve what is known today as a point of purchase sale (i.e., soliciting for a product that is available on the spot).

Watchtower Bible and Tract Society v. Stratton (2002)

In 2002, the U.S. Supreme court handed down another Jehovah's Witness case—this time involving an ordinance approved by an Ohio village of 278 residents that required a door-to-door canvasser to secure a permit from the mayor's office and sign a registration form. In *Watchtower Bible and Tract Society v. Village of Stratton* (2002),[18] the Court ruled 8 to 1 (with only Chief Justice Rehnquist dissenting) that the ordinance violated the First Amendment. The decision capped more than 50 years of cases involving the Witnesses, all of which favored the religious sect. Although the permit required no fee, failure to request a permit was a misdemeanor.

The village argued the ordinance was necessary to protect its residents from fraud, annoyance, and criminal activities. Both a U.S. District Court and the 6th Circuit U.S. Court of Appeals held the ordinance was content-neutral and thus subject to intermediate scrutiny, ruling in favor of Stratton.

The U.S. Supreme Court reversed on grounds that the ordinance was overly broad, covering both commercial and noncommercial speech, including political and religious activities. The Court specifically noted it was not determining whether strict scrutiny was the appropriate level of review because the ordinance was so broad in its impact. The Court did hint that "[h]ad its provisions been construed to apply only to commercial activities and the solicitation of funds, arguably the ordinance would have been tailored to the village's interest in protecting its residents' privacy and preventing fraud." The Court also said, "It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so."[19] The majority opinion did suggest that if the ordinance had been limited to commercial activities and the solicitation of funds, it might not have violated the U.S. Constitution.

Commercial Speech for Professionals and Corporations

This section looks at three major categories of commercial speech—media corporations, nonmedia corporations, and professionals. Of the three, media corporations have generally made the strongest headway in obtaining protection for commercial speech, but they do not have a perfect win–loss record. Nonmedia corporations have received the most attention from the courts, especially the U.S. Supreme Court. Such corporations have made progress in spite of surprising setbacks, but limits of First Amendment protection for commercial speech have been tested most by professionals, particularly lawyers, who achieved mixed results. The general trend continues to be

broader protection for commercial speech but with twists and turns that often defy logic.

First Amendment Rights of Media Corporations

New York Times v. Sullivan (1964)

In 1964, the U.S. Supreme Court for the first time issued a major decision involving commercial "political" speech. In the landmark libel decision—the most important libel decision rendered by the Court, *New York Times v. Sullivan*,[20] the Court rejected the argument that First and 14th Amendment freedoms of speech and press did not apply in the case. This is because allegedly libelous information appeared in a paid, commercial advertisement in the newspaper:

> The publication here was not a 'commercial' advertisement in the sense in which the word was used in [*Valentine v.*] *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. That the [*New York*] *Times* was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.[21]

The Court went on to rationalize that if the Court had ruled otherwise, the effect would be to discourage newspapers from publishing this type of advertising, which the Court characterized as "editorial advertisements." The Court was particularly concerned that certain groups such as civil rights organizations that do not have ready access to the press would be prevented from disseminating their ideas to a wide audience. As the majority noted, "The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources. . . .'"[22]

Political communication has been granted greater First Amendment protection than any other form of speech including religious communication, which is a close second. Thus this decision that the *New York Times* did not lose its First Amendment protection because the communication was a paid advertisement easily fits into the Supreme Court's First Amendment mold. The question of whether the commercial speech doctrine would apply in this case was one of the most significant aspects of the *Sullivan* decision, although the new rule enunciated, known as the "actual malice" rule (discussed in Chapter 8), overshadowed the "editorial advertisement" ruling. It could be argued that *Sullivan* was the first step taken by the Supreme Court toward eventually dismembering the commercial speech doctrine by the 1980s, even if *Sullivan* is not perceived as a commercial speech decision.

An important question is whether the Court's reasoning on the commercial speech issue in *Sullivan* is supportable. Would struggling political groups be denied a public forum for their ideas if the press were faced with the possibility of having no First Amendment protection if it published their paid advertisements? Or would the press still be willing to take the risk of no protection in order to obtain the advertising dollars

that sustain the commercial media? No one has thoroughly researched this question. But it is likely that if all commercial speech were treated the same for the purposes of the First Amendment, under the expanded protection granted commercial speech in the last two decades, there would be a "chilling" effect. This could work to the disadvantage of political and religious movements that garner little press attention and thus often resort to unconventional communication such as editorial commercials.

Until the early to mid-1970s, the U.S. Supreme Court generally avoided facing constitutional questions involving commercial speech by simply denying certiorari. But the consumer movement beginning in the late 1960s and the polarization of public opinion on the issue of abortion that culminated with *Roe v. Wade*[23] in 1973 had an impact on the type of commercial speech cases reaching the Court. *Roe v. Wade* is the controversial decision granting a woman the constitutional right to an abortion. More specifically, the Court was faced with deciding the constitutionality of governmental restrictions on advertising that did not appear to fall neatly into either a religious or political niche. Was such advertising commercial speech or was it a form of advertising that could be shielded by the First Amendment?

Pittsburgh Press v. Pittsburgh Commission on Human Relations (1973)

In 1973, the Court had the opportunity to pull back on the commercial speech doctrine by expanding the context in which commercial speech enjoys full First Amendment protection but chose instead to hold on to *Valentine v. Chrestensen*. The city of Pittsburgh enacted an ordinance in the late 1960s that banned sex discrimination by employers for a broad range of occupations. The *Pittsburgh Press* had long permitted employers placing help-wanted ads in the paper's classified section to list openings under "Jobs—Male Interest," "Jobs—Female Interest," and "Jobs—Male–Female." There was no doubt that these ads effectively promoted sex discrimination by allowing employers to screen out applications from members of the "unwanted" sex. However, the Court was faced with the question of whether such ads were comparable to the ad in *Valentine v. Chrestensen* or the "advertorial" in *New York Times v. Sullivan*. Is it pure commercial speech or a hybrid that can be shielded by the First Amendment?

Pittsburgh Press v. Pittsburgh Commission on Human Relations (1973)[24] began when the Pittsburgh Commission on Human Relations, which had been granted the authority to enforce the city's anti-discrimination ordinance, charged the newspaper with violating the ordinance and, after a hearing, ordered the *Press* to comply with the law. On appeal by the paper, the Court of Common Pleas for Allegheny County affirmed the order. On appeal, the Commonwealth Court of Pennsylvania modified the order to prohibit gender-designated classified ads only for those types of positions for which the ordinance forbade sex discrimination. The newspaper was allowed to carry ads specifying gender for occupations not covered by the law. The Pennsylvania Supreme Court declined to review the case, but the U.S. Supreme Court granted certiorari and heard oral arguments.

In a narrow 5 to 4 decision, the Court held that the ordinance did not violate the First and 14th Amendments by banning illegal gender-specified advertising.

The line-up of the justices was surprising but perhaps a harbinger of other commercial speech cases to come. Associate Justice Lewis F. Powell, Jr. wrote the 5 to 4 decision, and was joined by staunch First Amendment advocates, Justices William J. Brennan, Jr., and Thurgood Marshall. The majority included conservatives, Justices Byron R. White and William H. Rehnquist. Dissenters were Chief Justice Warren Burger, William O. Douglas, Harry A. Blackmun, and Potter Stewart.

How could justices such as Brennan and Marshall justify what is prior restraint on the press? According to the majority, "No suggestion is made in this case that the Ordinance was passed with any purpose of muzzling or curbing the press."[25] Ironically, the Court quoted from *New York Times v. Sullivan* to point to the importance of the First Amendment while finding that the ads resembled those of *Valentine v. Chrestensen* rather than *New York Times v. Sullivan*. The majority opinion went even further, comparing the ad to one for narcotics or prostitution:

> Discrimination in employment is not only commercial activity, it is illegal commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned 'Narcotics for Sale' and 'Prostitutes Wanted' rather than stated within the four corners of the advertisement. The illegality in this case may be less overt, but we see no difference in principle here.[26]

The majority simply did not see the state's action in this case as prior restraint even though the effect of the order was to prohibit the newspaper from publishing particular content. As Justice Stewart noted: "So far as I know, this is the first case in this or any other American court that permits a government agency to enter a composing room of a newspaper and dictate to the publisher the layout and the makeup of the newspaper's pages. This is the first such case, but I fear it may not be the last. The camel's nose is in the tent."[27]

Justices Stewart and Douglas acknowledged in the dissent that it was "within the police power of the city of Pittsburgh to prohibit discrimination in private employment on the basis of race, color, religion, ancestry, national origin, place of birth, or sex."[28] But they felt the government had no authority to tell a newspaper in advance what it could and could not publish. Chief Justice Burger dissented on grounds that the decision was an enlargement of the 'commercial speech' doctrine ". . . and also launches the courts on what I perceive to be a treacherous path of defining what layout and organizational decisions of newspapers are 'sufficiently associated' with the 'commercial' parts of the papers. . . ."[29]

Bigelow v. Virginia (1975)

Was the court headed down a "treacherous path"? Two years later in *Bigelow v. Virginia* (1975)[30] the Court issued another decision in a commercial speech case involving the mass media. Like *Pittsburgh Press*, the case had overtones of prior restraint but with a new twist. This case also illustrates how the opinions in one case

can spill over into other decisions on the same topic but on an issue involving much different principles. An apparent spillover in *Pittsburgh Press*, for example, can be surmised by the fact that Justices Brennan and Marshall consistently upheld the constitutionality of anti-discrimination laws and that the newspaper ads effectively promoted sex discrimination. In *Bigelow*, the apparent spillover was evidenced by the fact that Justices White and Rehnquist dissented in *Roe v. Wade* (1973) and in *Bigelow*, which involved newspaper ads for abortions.

In 1971, two years before *Roe v. Wade*, abortion was illegal in Virginia, although it was permitted in some states such as New York. Jeffrey C. Bigelow, a director and managing editor of *The Virginia Weekly* of Charlottesville, ran the following advertisement in his newspaper for a New York City abortion referral service:

> UNWANTED PREGNANCY — LET US HELP YOU
>
> Abortions are now legal in New York. There are no residency requirements.
>
> FOR IMMEDIATE PLACEMENT IN ACCREDITED HOSPITALS AND CLINICS AT LOW COST
>
> Contact WOMEN'S PAVILION
>
> 515 Madison Avenue
>
> New York, NY 10022
>
> Or call any time: (212) 371-6670 or (212) 371-6650
>
> AVAILABLE 7 DAYS a WEEK
>
> STRICTLY CONFIDENTIAL
>
> We will make all arrangements for you and help you with information and counseling.

Abortion was legal in New York at the time the ad appeared but became illegal later. As you can see, the newspaper ad provided considerable information about abortions in New York including the fact that residency was not required. There was no doubt that the ad was designed to encourage Virginia women to procure abortions in New York. It specifically mentioned that the Women's Pavilion could assist a woman in obtaining "immediate placement in accredited hospitals at low cost" and it would make all arrangements on a "strictly confidential" basis. The newspaper had a high circulation on the University of Virginia campus.

The statute under which Bigelow was prosecuted directly forbade anyone, including by publication, lecture or advertisement, from encouraging or promoting the procurement of an abortion or miscarriage. The editor was convicted of a misdemeanor (the statute made the crime a misdemeanor only) in Albemarle County Court. He appealed to the Albemarle Circuit Court and was granted a *trial de novo* but was convicted again. The Virginia Supreme Court affirmed the new conviction

on grounds that the advertisement was purely commercial and therefore not shielded by the umbrella of the First Amendment. The U.S. Supreme Court granted certiorari and sent the case back to the Virginia Supreme Court for further consideration in light of *Roe v. Wade* (1973) and related decisions. Once again, the state supreme court affirmed the conviction, and Bigelow filed another appeal with the U.S. Supreme Court. This time, fate was on his side.

In a resounding 7 to 2 decision, the U.S. Supreme Court reversed Bigelow's conviction. In the majority opinion by Justice Harry A. Blackmun, the Court held the ad did have full First Amendment protection, just as did the ad in *New York Times v. Sullivan*:

> The fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees. . . . The advertisement . . . did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'[31]

What material did the Court view as in the public interest? The Court cited the lines, "Abortions are now legal in New York. There are no residency requirements." The Court also said:

> Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also those with a general curiosity about, or genuine interest in, the subject matter of the law of another state. . . . The mere existence of the Women's Pavilion in New York City, with the possibility of its being typical of other organizations there, and the availability of the services offered, were not unnewsworthy.[32]

Notice the Court's reference to *newsworthiness*. In *New York Times v. Sullivan*, the Court did not refer to this factor and merely noted that the ad was not a commercial advertisement in the sense of *Chrestensen* but instead was an "editorial advertisement." How does an ad become newsworthy? Is newsworthiness alone sufficient to warrant full First Amendment protection for an ad or is it to be considered in light of other factors? Would the ad have been protected if it had been nothing more than the name, address, and telephone number of the Women's Pavilion under the heading "Abortion Referral"? In other words, does it enjoy constitutional protection primarily because of the "newsworthy" information it conveyed?

The Court left these questions unanswered, but it was apparent the Court was headed toward expansion of First Amendment rights for a variety of forms of advertising. No matter how hard one tries, it is impossible to reconcile *Chrestensen* with *Bigelow* and even with *New York Times v. Sullivan*. In his dissent, Justice William H. Rehnquist (joined by Justice Byron R. White) characterized the nature of the ad as an exchange of services rather than an exchange of ideas, but the handwriting was on the wall. Both justices also dissented in the *Roe v. Wade* abortion decision.

City of Cincinnati v. Discovery Network, Inc. (1993)

Eighteen years after *Bigelow*, the U.S. Supreme Court added icing to the cake when it struck down a city ordinance that barred the distribution of commercial handbills in news racks but imposed no such ban on advertising for traditional newspapers. In *City of Cincinnati v. Discovery Network, Inc.,*[33] the Court affirmed a ruling of the 6th Circuit U.S. Court of Appeals that the ordinance failed the *Hudson* four-prong test, discussed below, including the fourth prong's requirement that the regulation be no more extensive than necessary to advance the government's interest. The 6 to 3 majority opinion written by Justice Stevens said the city had a significant interest in preventing littering, which had become a problem near such news racks. But, the Court contended that the city was not justified in making a distinction between publications that were predominantly advertising and more traditional publications.

The Supreme Court held that the fourth prong of the *Hudson* test imposes a burden of proof on the government in demonstrating a "reasonable fit" between the ends and means chosen to further the substantial government interest. The City of Cincinnati, according to the Court, had not shown "reasonable fit" because the city focused on the content of the handbills rather than the effect of the ordinance in achieving the city's goal of reducing litter. The Court was clearly bothered by the inappropriate distinction the city made between commercial and noncommercial speech. As the majority opinion noted, "In our view, the city's argument attaches more importance to the distinction between commercial speech and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech." As the Court pointed out, there was no evidence presented by the city that the news racks for handbills contributed more to the litter problem than other news racks.

Dissenters—Chief Justice Rehnquist, joined in his opinion by Justices White and Thomas—strongly disagreed with the majority's reasoning, arguing that the ordinance "burdened less speech than necessary to fully accomplish its [the city's] objective of alleviating the problems caused by the proliferation of news racks on its street corners."

Cincinnati v. Discovery Network seems to be at least a slight broadening of the concept of "reasonable fit" introduced four years earlier in *Board of Trustees of the State University of New York v. Fox*,[34] although the precise boundaries are by no means clear. The handbills or free circulation publications as they are sometimes known do appear to have been considered the press for purposes of the First Amendment, as indicated by the criticism by the Court of the City of Cincinnati for its distinction based on content in enforcing the ordinance. This may at least partially explain why the government lost in a case that, for all practical purposes, involved traditional advertising rather than public interest commercial speech such as that in *Bigelow*. The decision would, without doubt, have been different if the racks had sold baseball collector cards, for example, but are collector cards really different from advertising circulars or even the daily newspaper that must be purchased with coins deposited in the news rack? What if the cards dealt with controversial issues such as drugs, politics or religion?

First Amendment Rights of Non-Media Corporations

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council (1976)

Less than a year after *Bigelow*, *Chrestensen* began its downward spiral. On May 24, 1976, the U.S. Supreme Court for the first time held that truthful commercial speech, even if purely commercial, is protected by the First Amendment. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (1976),[35] is more of a professional advertising case than either a media or nonmedia corporation case, but it set the pace for future commercial speech decisions. The Court ruled 7 to 1 in the case that a state statute under which licensed pharmacists could be punished for unprofessional conduct for advertising prescription drug prices was unconstitutional. The penalties ranged from small fines to license revocation. The statute was not challenged by pharmacists in the courts but by consumer groups who claimed "the First Amendment entitles the user of prescription drugs to receive information that pharmacists wish to communicate to them through advertising and other promotional means, concerning the prices of such drugs."[36]

The majority opinion by Associate Justice Harry A. Blackmun noted, much to the surprise of many First Amendment scholars, that "in *Bigelow v. Virginia*, the notion of unprotected 'commercial speech' all but passed from the scene." Even a close reading of the Court's opinion in *Bigelow* gives no clear indication that such is the case.

The Court in *Virginia State Board* conceded that a "fragment of hope for the continuing validity of a 'commercial speech' exception arguably may have persisted because of the subject matter of the advertisement in *Bigelow*." The Court then tackled the issue of whether "there is a First Amendment exception for 'commercial speech.'" The Court made clear that *Virginia Pharmacy Board* did not involve cultural, philosophical or political speech, nor was the information newsworthy about commercial matters. Instead, a pharmacist, according to the Court, is attempting to communicate, "I will sell you the X prescription drug at the Y price." Citing *New York Times v. Sullivan*, the Court then noted that it is well established that speech does not lose its First Amendment protection simply because money is spent to purchase it.

According to the justices, "Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged." Thus a consumer's interest in such information could be as "keen, if not keener, than his interest in the day's most urgent political debate." The majority opinion strongly criticized Virginia's contention that price advertising would adversely affect the professionalism of pharmacists and harm consumers with low quality service and presumably inferior drugs. Keeping consumers ignorant is not the solution, according to the Court, individuals should be permitted to make their own choices based on information freely available in the marketplace.

Although the justices held that Virginia's statute was unconstitutional, they noted that "some forms of commercial speech regulation are surely permissible."

They specifically mentioned untruthful commercial speech such as false and misleading ads and false advertising that causes actual injury. Virginia, in the Court's view, was unconstitutionally suppressing truthful speech that could contribute "to the flow of accurate and reliable information relevant to public and private decision making" for the sake of preventing the dissemination of falsehoods. In other words, the Court was warning the state not to throw the baby out with the bath water. The First Amendment warrants the risk that some false information may sneak into the marketplace so that the truth may prevail.

Justice William H. Rehnquist was the sole dissenter to the Court's decision. His opinion is worthy of note, not so much for its reasoning as for the fact that it represents a strong minority view shared by some professional associations. Rehnquist was particularly concerned that the Court's opinion would open the way "not only for dissemination of price information but for active promotion of prescription drugs, liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage."[37] To illustrate his point, he satirically penned some "representative" advertisements that a pharmacist might run in the local newspaper:

> Pain getting you down? Insist that your physician prescribe Demoral. You pay a little more than for aspirin, but you get a lot more relief.
>
> Can't shake the fiu? Get a prescription for tetracycline from your doctor today.
>
> Don't spend another sleepless night. Ask your doctor to prescribe Seconal without delay.[38]

Eventually, ads for prescription drugs did appear in consumer magazines and newspapers in the mid-1990s when the U.S. Food and Drug Administration began relaxing its rules regarding such advertising. Magazines such as *Parade, Time*, and *Newsweek* regularly carry ads for prescription drugs for allergies, asthma, diabetes, and high cholesterol. In fact, by 2005, the pharmaceutical industry was spending more than $3 billion annually in consumer advertising, often called *direct-to-consumer* or *DTC advertising.* According to a study in the *Journal of the American Medical Association*,[39] such advertising has paid dividends, with physicians writing more prescriptions for advertised drugs in response to requests from their patients. Another study of DTC advertising found that these ads "play a beneficial role in consumer health care decision making," particularly as an educational tool.[40] The study also found that older consumers, to whom much of the advertising is directed, perceived more usefulness in the ads than younger consumers.

The *Bigelow* decision appears to have had little, if any, negative impact on public perceptions of pharmacists. Any concern that the publication of prescription prices would somehow demean pharmacists has long since faded. However, as indicated in the decisions that follow, professional organizations, as a whole—whether they are for lawyers, physicians, or other professionals—continue to harbor fears that advertising will spell the demise of public respect for their particular professions.

One more point in Justice Rehnquist's dissent deserves attention because it represents a vocal, minority view. According to Justice Rehnquist, "The statute . . . only forbids pharmacists to publish this price information. There is no prohibition against a consumer group, such as appellees, collecting and publishing comparative price information as to various pharmacies in an area."[38] This view ignores the reality that consumer groups would have to expend considerable time and money to compile such data even though pharmacists are in a much better position because they have direct access to this information. Pharmacists also have a much more effective outlet for communication—newspaper advertising. Most consumer groups could probably not afford to place such advertising. They would have to rely on alternative means such as pamphlets that would likely have limited circulation, particularly among groups—such as the poor and the elderly—who benefit the most from competition among pharmacies. This view has an aura of elitism because it assumes consumers would not be able to effectively and efficiently discern accurate information from deceptive and misleading advertising.

Did *Virginia State Board of Pharmacy* settle the issue once and for all of whether commercial speech had First Amendment protection? Just as *Roe v. Wade* spurred more questions about abortion rights, the Virginia decision left a significant number of unresolved subissues that the Court continues to confront decades later. Three major decisions on the issue were handed down by the next year, and there have been several subsequent rulings. Many of these dealt with advertising of professional services, although other types of commercial speech have been in the spotlight as well.

The first two of the three 1977 decisions are summarized here. The third is deferred to the next section because it deals with advertising by professionals.

Linmark Associates, Inc. v. Willingboro (1977)

In *Linmark Associates, Inc. v. Willingboro* (1977),[41] the Court held 8 to 0 (Justice Rehnquist not participating) that a local ordinance banning the posting of "For Sale" and "Sold" signs on lawns violated the First Amendment. The opinion, written by Thurgood Marshall, said that whereas the goal of the ordinance to prevent "white flight" from neighborhoods as they were racially integrated ("block busting") may have been noble, the town had not been able to show such a restriction was necessary or justified under the circumstances. "If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act 'irrationally,'" according to the Court.[42]

Hugh Carey v. Population Services International (1977)

In *Hugh Carey v. Population Services International* (1977),[43] a New York education law making it illegal for anyone to sell or distribute nonprescription contraceptives to minors under age 16 and for anyone to advertise or publicly display such contraceptives was declared unconstitutional by a divided court. Population Services International owned Population Planning Associates, a North Carolina corporation that advertised and sold contraceptives to customers of any age via mail order throughout

the country, including in New York. (The ads appeared in New York magazines and newspapers.) In applying a *strict scrutiny* test to the statute because of an earlier decision by another divided court that appeared to recognize a limited constitutional right to privacy,[44] Justice William J. Brennan, Jr., writing for the majority, held that the prohibition on distribution of contraceptives violated 14th Amendment due process, but the justices could not agree whether such a ban for minors under the age of 16 was permissible. The Court held the advertising restrictions violated the First Amendment, although the majority could not agree on whether such restrictions are inherently unconstitutional.

First National Bank of Boston v. Bellotti (1978)

One year after *Hugh Carey,* the Supreme Court handed down a relatively unnoticed case involving the First Amendment rights of nonmedia corporations. In *First National Bank of Boston v. Bellotti* (1978),[45] the Court struck down as unconstitutional a Massachusetts statute that banned banks and other businesses from attempting to exert direct influence on public opinion unless the issue involved directly and materially affected its business, property, or other assets. The bank had tried to get voters to reject a proposed constitutional amendment granting the legislature authority to enact a progressive (i.e., graduated) personal income tax. In striking it down, the Court for the first time held that nonmedia corporations have First Amendment rights.

Consolidated Edison and *Central Hudson Gas & Electric* (1980)

Two years later, the Supreme Court handed down two decisions on the same day dealing with commercial speech rights of public utilities. During the mid- to late 1970s, many public utilities began speaking out on controversial issues such as nuclear energy and environmental regulations and discussing their views in circulars sent with the monthly bills. Both *Consolidated Edison Co. v. Public Service Commission of New York* (1980)[46] and *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* (1980)[47] involved attempts by the same state regulatory agency to bar a utility from engaging in particular types of commercial speech. The content of the speech differed significantly between the two utilities, but the First Amendment issues were similar.

In 1977, the New York Public Service Commission issued an order barring all public utilities from "using bill inserts to discuss political matters, including the desirability of future development of nuclear power." The order was sparked by a complaint filed by the Natural Resources Defense Council (NRDC), a consumer group opposed to nuclear power, after Consolidated Edison included an item entitled "Independence Is Still a Goal, and Nuclear Power Is Needed to Win the Battle" in its January 1976 monthly insert. The item touted benefits of nuclear energy and noted that they outweighed any risks and that this form of energy was economical, clean, and safe.

The NRDC had asked the electric utility to include a rebuttal written by the NRDC in the next month's insert. When Con Ed refused, the NRDC filed a complaint with the commission and requested that the commission order Con Ed to

offer space in the monthly inserts to organizations and individuals holding views opposed to those expressed by the utility on public controversies. Instead of granting the NRDC's request, the commission adopted a policy of prohibiting public utilities from discussing issues of public controversy. The ban was aimed at the topic of nuclear energy, but it imposed prior restraint on all public controversies.

Consolidated Edison challenged the order in court. The New York Supreme Court (an intermediate state appellate court) held that the order was an unconstitutional prior restraint, but the appellate division of the state supreme court reversed and the New York Court of Appeals, the highest appellate court in the state, affirmed. The state court of appeals held that the order was a reasonable time, place, and manner restriction that was designed to protect a legitimate state interest—individual privacy (essentially the right not to be bombarded with utility propaganda).

In a 7 to 2 decision written by Associate Justice Lewis F. Powell, Jr., the U.S. Supreme Court reversed the New York Court of Appeals. According to the Court, the ban was not "(i) a reasonable time, place, and manner restriction, (ii) a permissible subject-matter regulation, or a narrowly tailored means of serving a compelling state interest."[48] The majority opinion specifically noted that "a constitutionally permissible time, place, and manner restriction may not be based upon either the content or subject matter of the speech." This is a reiteration of a well established principle that such prior restraint must be *content-neutral*.

What about the consumer's right of privacy to not be exposed to such controversies when a monthly utility bill is opened? The Court rejected this rationale and a number of other justifications the state offered in its defense for imposing the ban. According to the Court:

> Passengers on public transportation or residents of a neighborhood disturbed by the raucous broadcasts from a passing soundtruck may well be unable to escape an unwanted message. But customers who encounter an objectionable billing insert may 'effectively avoid further bombardment of their sensibilities simply by averting their eyes.' . . . The customer of Consolidated Edison may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket.[49]

The Court also rejected the argument that the decision in *Red Lion Broadcasting v. Federal Communications Commission* (1969)[50] (discussed in the next chapter) upholding the Fairness Doctrine justified the ban, noting that the airwaves are limited public resources while billing inserts are not. Even the argument that the ban would prevent consumers from subsidizing the expense of the utility's airing of its controversial views was rejected. There was nothing to indicate that the agency "could not exclude the cost of these bill inserts from the utility's rate base," according to the Court.

In *Central Hudson Gas & Electric v. Public Service Commission of New York* (1980),[51] the U.S. Supreme Court articulated a new four-part analysis for determining whether a particular restriction on commercial speech is constitutional. In 1973, the U.S. suffered an energy crisis brought on by an oil embargo imposed by the Arab

cartel known as Organization of Petroleum Exporting Countries (OPEC) in October in retaliation for U.S. support of Israel during the Arab–Israeli War. The ban was lifted on March 18, 1974, after rather severe fuel shortages in this country. The federal government and most states adopted stringent energy conservation measures and launched a public relations effort to encourage Americans to adopt their own conservation methods.

During the energy crisis, the New York Public Service Commission (PSC) ordered the electric utilities in the state including Central Hudson not to advertise or promote the use of electricity. The electric companies complied with the order during the national energy crisis. But after the embargo was lifted in 1974, the effects of the shortage began to wear off, and some public utilities slowly reverted to their traditional promotional advertising. In 1977, the New York PSC adopted a policy statement that continued its ban on promotional advertising even though the energy crisis abated. The statement did not ban all advertising, only "promotional advertising," the commission defined as designed to promote purchase of utility service. Institutional and informational advertising that was not aimed at increasing sales was not prohibited.

Central Hudson Gas & Electric challenged the ban on First and 14th Amendment grounds in court, but the state trial court, intermediate appellate court, and the New York Court of Appeals all held that the order was constitutional. However, in an 8 to 1 opinion written by Justice Lewis F. Powell, Jr., the Supreme Court ruled the ban was unconstitutional. Although there were three separate concurring opinions, only Justice Rehnquist dissented. Justice Powell noted:

> Our decisions have recognized "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." [cites omitted] The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. . . . The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation. The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it . . . or commercial speech related to illegal activity.[52] [footnotes omitted]

The opinion offered a four-part analysis for courts to apply in commercial speech cases:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the

governmental interest asserted, and whether it is more extensive than necessary to serve that interest.[53]

The Court then applied the analysis to the *Central Hudson* case and determined that the ban did violate the First Amendment. The Court made several interesting points in its analysis. First, the opinion noted that unless there are extraordinary conditions, a monopoly position such as control over the supply of electricity in this case does not change the First Amendment protection accorded the business. Second, although the state's interest in imposing the ban (conserving energy and ensuring fair and efficient rates) was substantial, any negative impact of promotional advertising was "highly speculative." Finally, the Court contended that the state had not demonstrated that its goal of promoting energy conservation could not be accomplished by a less restrictive means than a total ban on promotional advertising.

As with any judicial analysis, the four-step *Central Hudson* test is not as clear and concise as some lower courts would prefer, but it has proven viable in subsequent commercial speech cases. The Court had effectively applied the test, or at least its basic premises, in decisions leading up to *Central Hudson*, but this was the first time the justices had articulated a specific, step-by-step analysis. Not all of the justices agreed with the test. Associate Justice Harry A. Blackmun, joined by William J. Brennan, Jr., indicated in a concurring opinion that the test "is not consistent with our prior cases and does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech."[54]

According to Justice Blackmun, "If the First Amendment guarantee means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public."[55] Thus Blackmun would extend the commercial speech doctrine to include a much broader range of expression than the *Central Hudson* formula. Justice John Paul Stevens, joined by Justice Brennan, also did not view *Central Hudson* as a commercial speech case. He felt the breadth of the ban exceeded the boundaries of the commercial speech concept: "This ban encompasses a great deal more than mere proposals to engage in certain kinds of commercial transactions." Justice Rehnquist, as would be expected based on his previous dissents in commercial speech cases, believed the state's ban was constitutional as a "permissible state regulation of an economic activity." He once again noted that "the Court unleashed a Pandora's box when it 'elevated' commercial speech to the level of traditional political speech by according it First Amendment protection."[56]

Could it be argued the promotional advertising was a form of political speech under the circumstances in *Central Hudson*? What if the utility had taken a direct stand against the PSC ban in its advertising? What if the company had indirectly promoted electricity by advertising new fuel-efficient appliances? Under Justice Rehnquist's analysis, could the commission have banned all utility company advertising, including "institutional and informational" ads?

First Amendment Protection for Unsolicited Mail Advertising: *Bolger v. Youngs Drug Products Corp.* (1983)

In 1983, the U.S. Supreme Court faced what might initially appear to be a question with a complex answer: is there a First Amendment right to mail *unsolicited* advertising for contraceptives? The answer provided by the Court in *Bolger v. Youngs Drug Products Corp.* (1983)[57] turned out to be rather simple: *yes*. Arriving at the answer was not a simple process. From the long line of cases discussed thus far in this book, it is clear that noncommercial unsolicited mailings have full First Amendment protection. Unsolicited commercial mail also has some First Amendment protection, thanks to *Central Hudson Gas & Electric*.

Youngs Drug Products, one of the largest manufacturers of condoms, planned to regularly send unsolicited advertising matter through the U.S. mail, including a drug store flyer and two pamphlets entitled "Condoms and Human Sexuality" and "Plain Talk about Venereal Disease." Hearing the company's plan, the U.S. Postal Service (USPS) notified the company that such mailings would violate a federal statute that provided "any unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter."[58] The USPS rejected Youngs' contention that the law violated the First Amendment. When the manufacturer sought declaratory and injunctive relief from the USPS decision in U.S. District Court for the District of Columbia, the court granted the injunction and declared the statute unconstitutional. The USPS appealed, but the U.S. Supreme Court upheld the lower court ruling.

The threshold question was whether this type of speech was commercial or noncommercial. Surprisingly, the Court opted for the former even though the pamphlets were at least highly informational. One of the pamphlets made numerous references to condoms made by Youngs, whereas the other focused more on generic issues. Thurgood Marshall wrote a majority opinion that agreed with the district court that informational pamphlets constituted commercial speech:

> Most of appellee's mailings fall within the core notion of commercial speech—"speech which does no more than propose a commercial transaction" [citing *Virginia Pharmacy*]. Youngs' informational pamphlets, however, cannot be characterized merely as proposals to engage in commercial transactions. Their proper classification as commercial or non-commercial speech thus presents a closer question. The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech [citing *New York Times v. Sullivan*]. Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech. Finally, the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn these materials into commercial speech [citing *Bigelow*]. The combination of all these characteristics, however, provides strong support for the District Court's conclusion that the informational pamphlets are properly characterized as commercial speech.[59]

Finding that the proposed mailings were commercial speech, the Court then applied the *Central Hudson* four-part test for determining whether the specific governmental restrictions on this commercial speech were constitutional. Although the government in this case was federal rather than state, as it had been in earlier cases, the four-part test is still the same. First, the Supreme Court determined that the advertising was not misleading and was not concerned with illegal activities and that it promoted "substantial individual and societal interests," such as family planning and the prevention of venereal disease. The USPS had claimed the substantial government interest was in preventing interference with parents' attempts to discuss birth control matters with their children, but the majority reasoned that the particular statute lent "only the most incremental support for the interest asserted. We can reasonably assume that parents already exercise substantial control over the disposition of mail once it enters their mailbox."[60]

The Court then went on to conclude that the statute was overly broad in achieving its objective. Noting that the unsolicited mailings were "entirely suitable for adults," Justice Marshall's opinion evoked an interesting analogy: the "level of discourse reaching a mailbox cannot be limited to that which would be suitable for a sandbox." This same reasoning has been applied in other contexts, including obscenity, when the argument is made that sexually explicit materials could accidentally fall into the hands of children.

The *Youngs Drug Products* decision is particularly apt today. The number of individuals with the acquired immune deficiency syndrome (AIDS) complex has escalated into a worldwide epidemic. Who would have predicted in 1983 that the U.S. Surgeon General would attempt to mail unsolicited to every household an information booklet on the disease, complete with prevention tips? It seems far fetched that by the end of the decade radio and television public service announcements would appear regularly to warn of the dangers of "unsafe sex" in spreading AIDS, touting condoms as a means of preventing AIDS and that radio and television stations would eventually accept paid advertising for condoms, without even a whimper from the Federal Communications Commission.

First Amendment Rights of Professionals: Lawyer Advertising

In 1977, the U.S. Supreme Court handed down the first of a series of cases involving lawyer advertising. In a split 5 to 4 decision written by Justice Harry A. Blackmun in *Bates v. State Bar of Arizona*,[61] the Court effectively broadened *Virginia Board of Pharmacy* to include the same type of advertising (i.e., prices) for lawyers. Attorney John R. Bates and his partner, Van O'Steen, started a legal service clinic in Phoenix that made extensive use of paralegals, standardized forms and other cost-cutting measures. In 1976, two years after they established the clinic that was designed to handle primarily routine services for lower income clients, the lawyers defied a state bar regulation that forbade advertising by placing an ad in the *Arizona Republican* that simply listed the services their firm offered and typical fees. The ad basically touted the availability of "routine services" for "very reasonable fees." No other claims were made.

At that time, Arizona, like most states, had strict regulations regarding advertising by certain professionals such as physicians and lawyers. These regulations were either in the form of codes enforced by a state licensing arm—such as a medical board or the state bar association—or of state statutes. Such regulations had the rationale that they would prevent deceptive and misleading advertising by these groups and that advertising demeaned the professions. As noted by Justice Rehnquist in his dissent in *Virginia Board of Pharmacy*: "It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected . . . but that does not automatically bring information about competing shampoos within the protection of the First Amendment."[62]

Although the Court ruled the Arizona regulation was an unconstitutional infringement on freedom of speech and freedom of the press, the justices had a more difficult time dealing with this case than with the earlier pharmacy decision. As licensed attorneys themselves, the justices no doubt were concerned that a ruling that was too broad in granting lawyers the right to advertise could open a Pandora's box that might ultimately undermine the standards and traditions of the profession. The close 5 to 4 vote certainly reflects that concern, as does the majority opinion itself. As Justice Blackmun indicated in the holding, "The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained."[63]

The Court not only made it clear that this holding was applicable only to the specific type of advertising involved, but it also went to unusual lengths to distinguish permissible versus impermissible forms of advertising. Whereas lawyers may advertise prices for such routine services as simple wills, uncontested bankruptcies, uncontested divorces and adoptions, the Court noted, advertising for more complex services such as contested divorces and estate settlements may be subject to regulation. The Court indicated, as it had in earlier decisions, that false, deceptive and misleading advertising can be restrained. But the majority opinion also mentioned that advertising claims as to the quality of services and in-person solicitations might be justifiably suppressed or limited. The Court noted that a warning or disclaimer could be required for certain kinds of advertising. As might be expected, the justices made no judgment whether such restraints would be upheld. The case did not involve any of this type of advertising. "In sum, we recognize that many of the problems in defining the boundary between the deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and smoothly,"[64] the Court said.

Could the Court have broadened the decision to include advertising by other professionals? Over the decades, the Supreme Court has enunciated an overbreadth doctrine on First Amendment issues, which essentially permits individuals challenging a statute on First Amendment grounds to demonstrate that the statute could be applied unconstitutionally in circumstances beyond those at issue in the case. This doctrine flies in the face of the traditional rule in constitutional cases that a statute can be challenged only in relation to the conduct or circumstances at hand. However, in First

Amendment cases the Court permits a broader challenge because "an overbroad statute might serve to chill protected speech. First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the effect of the statute." The justices could clearly have broadened the decision to include advertising by other professionals such as physicians and dentists. But the Court chose not to do so in *Bates* because "the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context." According to the majority, advertising is unlikely to be affected by chilling effect because it is "linked to commercial well-being."

What is the importance of this case? Even with the 5 to 4 vote, *Bates* is definitely a broadening of the principles laid down in *Virginia Board of Pharmacy*. But this extension of First Amendment protection to include advertising of routine legal services (*Virginia Board of Pharmacy* dealt only with advertising of prescription drug prices, not the availability of services) was not wide enough to put truthful advertising on par with other forms of speech. The Court chose deliberately from the beginning with *Bigelow* to follow the circuitous route of a case-by-case analysis rather than applying the overbreadth doctrine that would have protected truthful commercial speech to the same extent as political and religious speech. *Bates* raised far more questions than it answered, and many of those questions have yet to be resolved, although the Court wrestled with some of them in subsequent cases.

The dissenters included Chief Justice Warren Burger and Associate Justices Lewis F. Powell, Jr., Potter Stewart, and William H. Rehnquist. Their basic argument was that the ruling was, as Justice Powell stated, "an invitation—by the public-spirited and the selfish lawyers alike—to engage in competitive advertising on an escalating basis." Justice Rehnquist went even further in his dissent. Although Justice Powell indicated in his dissent that some forms of legal advertising might have First Amendment protection, Rehnquist clung to *Valentine v. Chrestensen*: "The *Valentine* distinction was constitutionally sound and practically workable, and I am still unwilling to take even one step down the slippery slope away from it."[65] In subsequent decisions, Rehnquist held that minority view even while serving as the Chief Justice, a role that forced him to seek consensus among the justices in forging more definite rulings.

Lawyer Solicitation: *Ohralik* and *In Re Primus*

Within a year after *Bates*, the Court began a series of decisions that set out the specific parameters of First Amendment protection for commercial speech of attorneys. In *Ohralik v. Ohio State Bar Association* (1978)[66] and *In Re Primus* (1978),[67] the U.S. Supreme Court ruled on the extent to which states may regulate attorneys' solicitation of potential clients. In *Ohralik* the Court upheld the suspension of an attorney by the Ohio Bar Association for his in-person solicitation of two 18-year-old women shortly after they had been in a car accident. The lawyer's efforts resulted in both victims signing contingent fee agreements with him. The state bar association suspended Ohralik even though it was never able to demonstrate any harm to

the women from the agreements. In his majority opinion, Justice Lewis F. Powell, Jr. distinguished this type of personal solicitation from the advertising in *Bates*. He said Ohio had a "legitimate and indeed 'compelling'" interest in "preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct."

In *In Re Primus*, a South Carolina volunteer American Civil Liberties Union attorney sent a letter to a former patient to solicit her as a potential plaintiff in a suit against a doctor. The lawyer believed the physician had sterilized pregnant women who were allegedly told they would no longer receive Medicaid care unless they agreed to the surgery. Justice Powell, writing for the majority, set aside a public reprimand handed down to the attorney on grounds that the First Amendment right to freedom of speech protected this form of political expression because there was no demonstration of "undue influence, overreaching, misrepresentation, or invasion of privacy."[68] The Court viewed Primus' actions as political, not commercial, expression, while Ohralik was engaging in a commercial transaction. Scholars may characterize such distinction as hair splitting, but the Court saw a difference. Justice Rehnquist dissented in *Primus* because he saw "no principled distinction" between the two cases in which "'ambulance-chasers' suffer one fate and 'civil liberties lawyers' another. . . I believe that constitutional inquiry must focus on the character of the conduct which the State seeks to regulate, and not on the motives of the individual lawyers or the nature of the particular litigation involved."[69]

Two years after *Central Hudson*, the Supreme Court ruled that a state may not restrict lawyer advertising to specific types of information. After the *Bates v. State Bar of Arizona* decision in 1977, the Missouri bar adopted some new rules of professional ethics that were believed to be permitted under the principles established in *Bates*. Most state bar associations, which traditionally determine the professional standards for attorneys in the state, have taken a rather conservative approach to advertising. Lawyers, in general, disapprove of most forms of promotion and advertising. When a state or appellate court approves restrictions on advertising imposed by the bar association in one state, the bar associations in other states usually move quickly to adopt those tougher standards if they do not already have them. Lawyers are not the only professionals who abhor advertising. The same sentiment against professional advertising appears to prevail among physicians, pharmacists, nurses, accountants, and so on.

The Missouri restrictions were rather severe, as the U.S. Supreme Court noted in *In Re R. M. J.* (1982),[70] in which the justices unanimously struck down a series of professional ethics rules. "RMJ" was reprimanded for violating several of the rules, including restrictions on information about areas of practice, announcements about office openings, and jurisdictions in which he was admitted to practice. The rules were so strict that only 23 specific terms could be used to describe areas of practice. For example, "RMJ" was reprimanded for using *real estate* instead of *property* in his ad and for listing *contracts* and *securities* as areas of practice. He also ran afoul of the rules by mailing out cards announcing the opening of his office to individuals who were not included in the categories to whom such information could be sent.

"RMJ" was also cited for truthfully advertising that he was a member of the Missouri and Illinois bars and that he had been admitted to practice before the U.S. Supreme Court.

The majority opinion, written by Associate Justice Lewis F. Powell, Jr., pointed out that the Missouri bar made no assertions the ads were in any way misleading or inaccurate and thus had demonstrated no substantial state interest in enacting the regulations. Indeed, about all the state had been able to show was that the ads may have approached bad taste. Although the Court held that all of the restrictions challenged were unconstitutional, Justice Powell indicated that the line in the ad in large boldface type proclaiming that "RMJ" was a member of the U.S. Supreme Court bar may have been somewhat misleading and unfortunate. A U.S. Supreme Court rule allows admission to practice before the Court if the attorney has been admitted to practice in the highest court of a state, territory, district, commonwealth, or possession for a minimum of three years and if the person "appears to the Court to be of good moral and professional character." After an application is filed and an admission fee paid, the attorney is sworn in. Thus the vast majority of attorneys are eligible to become members of the Supreme Court bar. Nevertheless, the Court noted there was nothing in the record to indicate that even this information was actually misleading, although "this relatively uninformative fact . . . could be misleading to the general public unfamiliar with the requirements of admission to the bar" of the Supreme Court.

The Court found that the other violations, including the mailing of announcement cards to a larger audience than that permitted under the rules[71] and the listing of other jurisdictions to which "RMJ" had been admitted, were not misleading and so were protected by the First Amendment.

The unanimous opinion in this case is not surprising in light of previous Court decisions, including *Bates*. The rules in this case were restrictive. Although the rationale of bar associations for imposing regulations is ostensibly to preserve respect for the dignity of the profession, one effect is to reduce competition among attorneys and prevent legal fees from declining. No mention of such effects was made in the Court's decision, but consumer groups argue that advertising by professionals improves the marketplace for consumers by increasing competition.

Over the decades, lawyers have continued to test the First Amendment limits of advertising. Three cases in the 1980s particularly stand out because lawyers in each case went considerably beyond the guidelines or rules established by their bar associations and yet found constitutional protection in the U.S. Supreme Court. In the first case, *Zauderer v. Office of Disciplinary Counsel* (1985),[72] a Columbus, Ohio, attorney named Philip Q. Zauderer violated the Ohio Disciplinary Rules governing attorneys when he ran a newspaper advertisement that indicated he was willing to handle on a contingent fee basis cases involving women who had been injured by an intra-uterine contraceptive device known as the Dalkon Shield. The ad included an illustration of the device. It claimed a client would owe no fees unless she won damages. Both the illustration and the "no fees" assertion were in clear violation of the Ohio rules. The top part of the ad in bold type with all capital letters asked, "Did you

use this IUD?" Along the side was a line drawing of the Dalkon Shield. The ad also noted, "Our law firm is presently representing women on such cases."

The Ohio Office of Disciplinary Counsel disciplined Zauderer for the ad on the grounds that he was soliciting business, had engaged in deceptive advertising, and had included a drawing in the ad. The Ohio Supreme Court upheld the state's disciplinary action, but the U.S. Supreme Court in a 5 to 3 decision held that the Ohio rule regarding solicitation was a violation of the First Amendment. The majority opinion, written by Justice Byron R. White, said the rule was overly broad because it applied to all forms of such advertising—deceptive and non-deceptive. The Court said: "Were we to accept the State's argument in this case [that such solicitations are inherently misleading and therefore subject to the ban], we would have little basis for preventing the Government from suppressing other forms of truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising."[73]

All eight of the justices voting found the ban on illustrations was unconstitutional. Six agreed that Zauderer could be disciplined for his claim that "no fees would be owed by the client" because he failed to disclose the client could be held responsible for court costs. While most states permit attorneys to represent clients at no charge and indeed encourage them to act *pro bono* for indigent individuals, courts and state codes of professional conduct generally do not permit attorneys to pay court costs for clients. Although courts usually have the discretion of waiving such costs when warranted, Ohio rules required full disclosure of information regarding contingency fees, and this was constitutionally sound, according to the U.S. Supreme Court.

Zauderer basically stands for the principle that attorneys and other professionals can engage in traditional forms of advertising and promotion so long as such commercial speech is neither misleading nor deceptive. The next case sent shock waves through some legal circles because it appears to have opened the door to a wide variety of advertising. The decision is particularly significant because it answered a major question that remained after *Ohralik*, *Bates*, and *Zauderer*: *do attorneys have a First Amendment right to solicit clients via direct mail?*

Kentucky attorney Richard D. Shapero requested the Attorneys Advertising Commission, a three-member body created by the Kentucky Supreme Court to regulate attorney advertising,[74] to approve a letter he wished to send to potential clients believed to be facing foreclosure on their home mortgages. The proposed letter urged the recipient to "call my office . . . for FREE information on how you can keep your home. Call NOW, don't wait. It may surprise you what I may be able to do for you" [capital letters in the original]. Under the Kentucky Supreme Court rules at that time, attorneys were banned from sending letters or advertisements to potential clients who might need legal assistance because of a change of circumstances such as a divorce, death in the family, or foreclosure. The commission rejected Shapero's letter as a direct solicitation in violation of the State Supreme Court rules. Shapero appealed the decision to the State Supreme Court which ruled against him. But the U.S. Supreme Court ruled 6 to 3 in *Shapero v. Kentucky Bar Association*[75] that the

Kentucky rule was a violation of the First and 14th Amendments because it imposed a blanket ban on both deceptive and non-deceptive advertising through the mail. The state had argued the prohibition was necessary to prevent lawyers from exerting undue influence or abusing individuals by taking advantage of potential clients facing serious legal problems.

The majority opinion, written by Justice William H. Brennan, Jr., contended, as the Court did in *Youngs Drug Products*, the potential for undue influence and fraud was significantly less than that of in-person solicitation, which the Court had held in *Ohralik* could be barred. The "File 13" proposition comes into play once again: if you don't like what you receive in the mail, throw it in the trash. Or, as Justice Brennan said, "Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and the reader of an advertisement can effectively avoid further bombardment of his sensibilities simply by averting his eyes."[76]

Attorney Shapero, by the way, continued to attract controversy. A year later he became the host of a 6 to 7 p.m. weekly call-in show on a Louisville, Kentucky, AM radio station. "Shapero at Law" was criticized by the *Louisville Courier-Journal* for allegedly airing inaccurate information. But the president-elect of the Kentucky Bar Association (KBA) and the Chief Justice of the Kentucky Supreme Court refused to criticize Shapero's show even though the KBA and the Court were targets of the colorful lawyer's comments.[77]

At the time of the *Shapero* decision, about half of the states permitted solicitation by mail. Now such attorney advertising, so long as it is not deceptive or misleading, is permitted in all states. The Kentucky Supreme Court revised its rules to delete this type of advertising as a violation, but still bans false, deceptive, and misleading ads, that are defined as containing "a material misrepresentation of fact or law" regarding (a) the nature of services offered, (b) an attorney's "educational background, employment history, professional experience or other credentials," (c) "a law firm's collective experience in a field of practice," or (d) "the identity of the lawyer(s) who will actually perform the legal services or the location of the office where the services will be performed."[78] The rules also prohibit the use of a nonlawyer in an ad in a way that "suggests or implies that he or she is a lawyer." A similar ban applies to ads in which an actor misrepresents himself as an actual client. The rules also ban props such as a car or truck "that suggests or implies that it was actually involved in a particular legal matter, where such display results in a material misrepresentation." Certain types of ads must carry a disclaimer that "This is an advertisement."[79]

There are specific provisions in the Kentucky rules regarding (a) information that must be included in an ad such as the office location and telephone number, (b) advertising that "creates unjustified expectations or makes unsubstantiated comparisons," and (c) "advertising that suggests a likelihood of satisfactory results irrespective of the merits of the particular matter."[80] Kentucky's rules are similar to those in many other states, which allow attorneys to voluntarily submit proposed ads to a commission that, for a fee, will review them for compliance.

In 1990, another barrier to certain types of lawyer advertising fell when the U.S. Supreme Court held in *Peel v. Attorney Registration and Disciplinary Commission*

of Illinois[81] that attorneys have a First Amendment right to advertise specialties certified by private or nonbar organizations. The case began when attorney Gary Peel sent a letter to two clients. Peel's letterhead included the statement, "Certified Civil Trial Specialist by the National Board of Trial Advocacy." The information had appeared on his letterhead for three years with no complaints, but the administrative agency of the Illinois Supreme Court, the Attorney Registration and Disciplinary Commission (ARDC), filed a formal complaint against Peel for violating the state Code of Professional Responsibility. According to the code, "A lawyer shall not hold himself out publicly as a specialist, except as follows: patent lawyer, trademark lawyer, admiralty lawyer." After a hearing, the ARDC ruled the attorney had acted improperly and recommended public censure. On appeal, the Illinois Supreme Court upheld the commission's findings, contending that the information on the letterhead was misleading to the public because of the similarity between *licensed* and *certified*. The State Supreme Court felt the public could wrongly believe that the attorney "may practice in the field of trial advocacy solely because he is certified by the NBTA." To be certified by the organization, a lawyer must have at least five years of civil trial practice, have acted as lead counsel in at least 15 civil cases, and pass a full-day exam.

In a 5 to 4 decision authored by Justice John Paul Stevens (joined by Justices Brennan, Blackmun, and Kennedy, with Justices Marshall and Brennan concurring separately), the U.S. Supreme Court rejected the state's contention that the letterhead was deceptive. Citing *In Re R. M. J.*, the majority said the claim of certification was information from which "a consumer may or may not draw an inference of the likely quality of an attorney's work in a given area of practice." Thus it was not automatically deceptive or misleading. The Court chided the state for its "paternalistic" rule, noting that this information was essentially no different from the assertion of "practice before the United States Supreme Court" approved in *In Re R. M. J.* The majority compared the certification claim to that of a trademark, noting that "the strength of certification is measured by the quality of the organization for which it stands." The justices said disclosure of *more* information, rather than withholding information, as the state wanted to do, best serves the public interest by educating consumers. Justice Marshall, joined by Brennan, concurred with the Court's judgment that the Illinois regulation was unconstitutional but asserted the letterhead could be misleading. According to these members of the Court, the ban went too far because there were less restrictive ways of accomplishing the same result.

Many attorneys, judges, and bar associations continue to oppose most forms of lawyer advertising, but anyone who regularly watches commercial television has no doubt noticed a proliferation of attorney ads, many of which are as crass and bold as those for new and used cars. Even the conservative American Bar Association (ABA), which for a long time opposed most forms of lawyer advertising, has relented. The rule struck down in *Shapero* was adopted by Kentucky from the ABA's Model Rules of Professional Conduct. (Most state bar associations have adopted these rules, usually with revisions, for their attorneys.) Now the *ABA Journal* carries articles on topics such as successful marketing, including appropriate advertising technique.

The ABA Model Rules of Professional Conduct permit many forms of advertising, including direct mail solicitations of the type challenged in *Shapero*.

The amount attorneys spend on advertising has continued to climb during the years since *Bates*. Some states, such as Texas, cling to stringent rules on ads. In 1988, the year *Shapero* was decided, the State Bar of Texas permitted an attorney to advertise only the law firm's address, the range of legal services offered, and prices.[82] According to a publication of the Yellow Pages Publishers Association, one Texas law firm was cited by the State Bar of Texas for violating its rules when it failed to mention the specific names of lawyers responsible for the areas of specialization cited in a Yellow Pages ad. The same publication noted, on the other hand, that a Florida attorney was apparently not in violation of that state's bar association rules (a version of ABA Rules of Professional Conduct) when his quarter-page spread in the local Yellow Pages proclaimed: "NATIONALLY KNOWN ATTORNEY WITH GUEST APPEARANCES ON 'GOOD MORNING AMERICA,' 'GERALDO,' 'ALAN BURKE' & OTHER SHOWS."[83]

In 1994, the U.S. Supreme issued a ruling in a lawyer advertising case with a new twist. In *Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy* (1994),[84] the Court held in the first majority opinion written by Justice Ginsburg that a Florida ban on lawyers advertising that they are also certified public accountants and certified financial planners was a violation of the First Amendment. The new dimension in this case was the placement of the prohibition by the state Board of Accountancy, which licenses and regulates certified public accountants, rather than by the state bar. Silvia Ibanez had placed the initials CPA and CFP in her yellow pages listing and on her business cards and law office stationery. CPA designates a certified public accountant, indicating board licensing. CFP is a designation for a certified financial planner, which is granted after an approved course of study and passing an exam administered by the Certified Financial Planner Board. On appeal, the accountancy board argued that the CPA designation by Ibanez was misleading because, as she had admitted at her hearing, she was practicing law, not accounting. The board contended that the CFP designation was misleading because, in conjunction with CPA, it implied state approval.

The Court unanimously held that the use of CPA was not misleading because Ibanez continued to hold her CPA license and thus the board was punishing her for disseminating truthful commercial speech. No deception and no harm to the public had been demonstrated. Although the accountancy board had reprimanded her for engaging in "false, deceptive, and misleading" advertising, it did not revoke her CPA license nor her CFP authorization. All but Chief Justice Rehnquist and Justice O'Connor believed the CFP designation was neither misleading nor harmful. The latter two justices contended the board could take action against Ibanez for not including a disclaimer to indicate that the CFP board was not affiliated with the state.

Ibanez is a victory for commercial speech. Licensing agencies remain free to impose limits on advertising but restrictions must meet the *Central Hudson* test. Under this standard, the state may ban advertising only if it is false, deceptive, or misleading. It may restrict advertising only if it can show that a restriction directly

and materially advances a substantial interest in a manner no more extensive than needed to advance that interest. The Court said, "The State's burden is not slight . . . '[M]ere speculation or conjecture' will not suffice; rather the State 'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree'" [cite omitted].[85]

In 1995, the U.S. Supreme Court dealt a blow to First Amendment protection for commercial speech. In *Florida Bar v. Went For It, Inc.,*[86] the Court held in a 5 to 4 opinion written by Justice O'Connor (joined by Chief Justice Rehnquist and Associate Justices Scalia, Thomas, and Breyer) that Florida Bar rules prohibiting personal injury attorneys from sending targeted direct mail solicitations to victims or their relatives for 30 days after an accident or disaster do not violate the first and 14th Amendments to the Constitution.

In 1990, the Florida Supreme Court approved with some revisions the state bar association's proposed amendments to the Rules of Professional Conduct that involve advertising.[87] The bar association made the proposals after a two-year study that included hearings, surveys, and public comments about lawyer advertising. An attorney[88] and his wholly owned lawyer referral service, Went For It, Inc., challenged two rules[89] in the U.S. District Court for the Middle District of Florida as unconstitutional. They did this because, taken together, the rules imposed a 30-day blackout after an accident or disaster in which attorneys could not directly or indirectly target victims or relatives for solicitation of business. Prior to the enactment of these rules, the attorney regularly mailed targeted solicitations to victims or their survivors and referred potential clients to other attorneys within 30 days. His suit for declaratory and injunctive relief asked that he be allowed to continue this practice. Both sides asked for summary judgment in their favor, and a magistrate judge to whom the district court referred the case recommended a summary judgment be granted to the bar. The district court rejected his recommendation and issued a summary judgment instead for the plaintiffs.[90] Citing *Bates* and others cited by the trial court, the Eleventh Circuit U.S. Court of Appeals reluctantly affirmed in 1994.[91] The Supreme Court acknowledged in the majority opinion that *Bates* had laid the "foundation" for two decades: "[i]t is well established that lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection." However, that measure of protection is limited, the Court said, noting that *Central Hudson* requires an intermediate level of scrutiny of restrictions on commercial speech.

Applying the *Central Hudson* test, the Court found that (a) the speech being regulated did not concern unlawful activity nor was it misleading, (b) the State Bar had a "substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers" and a substantial interest in protecting "the flagging reputations of Florida lawyers by preventing them from engaging in conduct that, the Bar Association maintains, 'is universally regarded as deplorable and beneath common decency . . .'" (c) based on extensive studies and other evidence (including news stories and editorials), that the harms targeted by the rules are "far from illusory," and (d) "[t]he palliative devised by the Bar to address these harms is narrow both in scope and in duration."[92]

Justice Kennedy's dissent in *Florida Bar* is notable because it demonstrates just how thin the majority was, and he minces no words regarding his disdain for the majority opinion. His blistering attack, to which Justices Stevens, Souter, and Ginsburg signed on, criticizes the document ("Summary of Record") the majority relied upon in supporting that the government had a substantial interest:

> This document includes no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of excluded results. There is no description of the statistical universe or scientific framework that permits any productive use of the information the so-called Summary of Record contains. The majority describes this anecdotal matter as 'noteworthy for its breadth and detail' . . . but when examined, it is noteworthy for its incompetence.[93]

His dissent goes on to say, "Our cases require something more than a few pages of self-serving and unsupported statements by the State to demonstrate that a regulation directly and materially advances the elimination of a real harm when the state seeks to suppress truthful and nondeceptive speech" [cite omitted]. The opinion notes the ban created by the bar association rule is much too broad: "Even assuming that interest [the state's interest] were legitimate, there is a wild disproportion between the harm supposed and the speech ban enforced."[94]

Justice Kennedy's other arguments include (a) mail is not sent to a "captive audience"—it can simply be thrown away, (b) there is no justification for assuming, as the majority does, that information provided in direct mail is "unwelcome or unnecessary" during the 30-day ban, and (c) the ban cuts off information at a time when "prompt legal representation" could be essential. He also notes that "[p]otential clients will not hire lawyers who offend them" and that a "solicitation letter is not a contract." According to Kennedy, "It is most ironic that, for the first time since *Bates v. State Bar of Arizona*, the Court now orders a major retreat from the constitutional guarantees for commercial speech in order to shield its own profession from public criticism." He concludes:

> Today's opinion is a serious departure, not only from our prior decisions involving attorney advertising, but also from the principles that govern the transmission of commercial speech. The Court's opinion reflects a new-found and illegitimate confidence that it, along with the Supreme Court of Florida, knows what is best for the Bar and its clients. Self-assurance has always been the hallmark of a censor. That is why under the First Amendment the public, not the State, has the right and the power to decide what ideas and information are deserving of their adherence. . . .[95]

Advertising by Other Professionals: *Friedman v. Rogers* (1979) and *Thompson v. Western States Medical Center* (2002)

Just as the Court has been reluctant to grant full First Amendment rights to commercial speech of attorneys, it has hesitated to broaden constitutional protection

for commercial speech of others. In 1979 in *Friedman v. Rogers*,[96] the justices held 7 to 2 that Texas could prevent optometrists from practicing under a trade name because the state had a "substantial and well-demonstrated" interest in protecting consumers from deceptive and misleading use of optometrical trade names. Three years later, the Court affirmed an opinion by the U.S. Court of Appeals for the Second Circuit[97] that upheld orders by the Federal Trade Commission (FTC) forbidding the American Medical Association and the American Dental Association from imposing total bans on advertising by members of their respective associations. In *American Medical Association v. Federal Trade Commission* (1982),[98] the Supreme Court upheld the appellate court decision without opinion. We do not know why the Court upheld the decision, although the rules did bar truthful advertising by physicians and dentists. The FTC rules are in line with *Bates*—permitting regulation of deceptive and misleading advertising.

In *Thompson v. Western States Medical Center* (2002),[99] the U.S. Supreme Court said in a plurality opinion written by Justice O'Connor that two provisions of the 1997 Food and Drug Administration Modernization Act violated the First Amendment. O'Connor was joined in her opinion by Justices Scalia, Kennedy, and Souter. Justice Thomas concurred in a separate opinion: "I concur because I agree with the Court's application of the test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n. of N.Y.*, 447 U.S. 557 (1980). I continue, however, to adhere to my view that cases such as this should not be analyzed under the *Central Hudson test*."[100] Chief Justice Rehnquist and Justices Breyer, Stevens and Ginsburg dissented.

The first provision struck down said that pharmacies may generally advertise and promote compounding (combining or mixing ingredients to create medication for a patient's specific needs), but they may not advertise that they compound a particular drug or class of drugs. The second provision said that pharmacists may fill prescriptions for compounded drugs only if the medications are "unsolicited." The Court applied the *Central Hudson* test, rejecting the federal government's arguments that the provisions would protect consumers by stopping pharmacies from doing an end run around the FDA approval process by effectively manufacturing new drugs. According to the plurality opinion, "We have previously rejected the notion that the government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information."[101]

Truthful Commercial Speech: From *Posadas* to *Johanns*

A 5 to 4 decision in 1986, written by Justice William H. Rehnquist, struck what appeared at the time to be a serious blow to the principle that truthful commercial speech concerned with a legal product or service enjoys First Amendment protection. *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico* (1986)[102] has never been explicitly overturned. However, it was discredited in subsequent decisions by the Court, including *44 Liquormart v. Rhode Island*,[103] discussed later,

in which all but one of the justices either rejected or seriously questioned the *Posadas* rationale. In *Posadas,* the Court applied the four-part *Central Hudson* test for commercial speech to find that a government's restrictions on advertising for legalized gambling were not in violation of the First Amendment. While the Court had indicated since *Bigelow v. Virginia* (1975) and up through *Bolger v. Youngs Drug Products* (1983) that advertising for legal products and services that was not misleading nor deceptive had constitutional protection, *Posadas* appeared, at least then, to have squelched progress made in cases toward putting commercial speech on an equal constitutional footing with noncommercial communication. No matter how much one scrutinizes the reasoning in *Posadas*, it is difficult to square it with the "Three Bs"—*Bigelow, Bates,* and *Bolger.* However, as is seen later in this section, *Posadas* has lost nearly all of its impact today.

In 1948, the Puerto Rican government legalized most types of casino gambling in an effort to beef up its tourism industry. The effort paid off as tourists flocked to the commonwealth. The 1948 legislation also banned all advertising by casinos to the residents of Puerto Rico. But such advertising was permitted to be directed at tourists within the commonwealth and in the continental United States. Puerto Rican citizens were allowed to use the casinos. A governmental agency, known as the Tourism Company of Puerto Rico, was granted the authority to administer the statute, including the advertising provisions. The Condado Holiday Inn, owned by Posadas de Puerto Rico Associates, defied the ban directed to Puerto Ricans and was fined on several occasions. The hotel consequently filed suit against the government agency, asking for a declaratory judgment that the advertising prohibition was unconstitutional.

After the case traveled through the Puerto Rican judicial system, including a dismissal by the Puerto Rican Supreme Court for lack of a substantive constitutional issue, the U.S. Supreme Court granted a petition for a writ of certiorari. On the threshold question of whether the particular speech in question was commercial or noncommercial, the Court determined that the case involved "the restriction of pure commercial speech which does no more than propose a commercial transaction." The Court applied the *Central Hudson* analysis. It found: (a) the restriction "concerns a lawful activity and is not misleading or fraudulent, at least in the abstract," (b) the "reduction in demand for casino gambling by the residents of Puerto Rico" that the government claimed was the result of the ban constituted the necessary substantial government interest, (c) the statute directly advanced the government's substantial interest because the legislature could reasonably believe that "advertising of casino gambling aimed at the residents . . . would serve to increase the demand for the product advertised," and (d) the restrictions were "no more extensive than necessary to serve the government's interest."

The casino had argued (a) the statute was too restrictive because it allowed advertising for other types of gambling such as lotteries, horse racing, and cockfighting, (b) the government could more effectively reduce the demand for casino gambling by promulgating speech designed to discourage gambling rather than suppressing speech that promoted this activity, (c) the activity involved here was similar to that in *Bigelow* and, therefore, deserved the protection offered by that case, and

(d) once the government legalized gambling, the First Amendment granted protection for advertising related to such activity.

The Court handily rejected all of the appellant's arguments and concluded that the prior restraint had passed the *Central Hudson* test and thus the advertising could make no claim of First Amendment protection. How can the Court justify such severe restrictions on the advertising of a perfectly legitimate activity? Compare gambling with alcohol and tobacco, and you have some indication of the rationale of the Court. The casino had argued that because the government had legalized gambling for tourists and residents, *Bigelow* and its progeny would dictate that the First Amendment would prevent the government from imposing advertising restrictions that were specifically designed to discourage citizens from legal gambling. In other words, once an activity, product or service is legalized, the First Amendment says, "Hands off any advertising, unless it is deceptive or misleading." In strongly rejecting that argument, the Court said the argument should be turned on its head. According to the majority opinion, if a government has the authority to completely prohibit an activity, it could "take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising."[104] The Court went on to mention tobacco, alcohol, and prostitution as examples.

Justice William J. Brennan, Jr. (joined by Thurgood Marshall and Harry A. Blackmun) contended in a dissent that the distinctions between commercial and noncommercial speech did not "justify protecting commercial speech less extensively where, as here, the government seeks to manipulate behavior by depriving citizens of truthful information concerning lawful activities."[105] According to Brennan, even if the government had been able to demonstrate that a substantial interest was involved, there was no evidence that this particular regulation would address that interest. The dissenting opinion argued that the government could have attempted to control harms such as organized crime and prostitution by keeping a tighter rein on the casinos: "It is incumbent upon the government to prove that more limited means are not sufficient to protect its interests, and for a court to decide whether or not the government has sustained this burden."[106]

The lower courts have struggled in interpreting the precise boundaries of "no more extensive than necessary" in the fourth prong of the *Central Hudson Gas & Electric* test, and the U.S. Supreme Court added to the confusion in spite of apparent good intentions. A good illustration of this is the Court's decision in *Board of Trustees of State University of New York v. Fox* (1989).[107] The case involved a First Amendment challenge to a university regulation banning private companies from sponsoring parties in student dormitories when housewares are being promoted. In overturning the rule, the Second Circuit U.S. Court of Appeals held that the standard for determining whether the regulation was no more extensive than necessary was that the state must use the least restrictive measure that could protect the state's interest. At first analysis, this holding may appear to be in line with *Hudson* and even *Posadas*. However, on appeal, the U.S. Supreme Court, in a 6 to 3 decision authored by Antonin Scalia, disagreed with the U.S. Court of Appeals and remanded the case back to the lower court for further findings.

According to the majority, the standard for determining whether a regulation is more extensive than necessary dictates that the restrictions must be "narrowly drawn" and "no more extensive than reasonably necessary" to further government interest. The Court noted that, even for political speech, the "least restrictive measure" test had not been applied in determining the constitutionality of reasonable time, place, and manner restrictions. Instead, the test has been whether regulations are narrowly tailored to promote a significant state interest. The Court noted that a similar test has been applied in determining the validity of restrictions on expressive conduct, including that in a political context. The Court reasoned it would be inappropriate "to apply a more rigid standard" for commercial speech than for other forms of speech that presumably had greater protection. As the Court said, "We think it would be incompatible," given the "subordinate position" of commercial speech, "to apply a more rigid standard in the present context."[108]

How should this test be applied? The state is not required to demonstrate that "the manner of restriction is absolutely the least severe that will achieve the desired end," but a balance, or "fit" as the Court called it, must be found between the asserted governmental interest and the approach taken to accomplish that interest:

> . . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in 'proportion to the interest served . . .;' that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to the governmental decision-makers to judge what manner of regulation may be best employed.[109]

The holding represents a significant retreat from the standard that many courts, including the Second Circuit U.S. Court of Appeals, believed applied in commercial speech cases after *Central Hudson Gas & Electric*. The new interpretation made it more difficult for governmental restrictions on commercial speech, including advertising, to be struck down as unconstitutional.

Alcohol advertising grabbed the truthful commercial speech spotlight in 1995 when the U.S. Supreme Court struck down a federal statute barring the advertising of the alcohol content of beer. The Federal Alcohol Administration Act (FAAA) of 1935, enacted by Congress after Prohibition died and "strength wars" started among brewers, barred brewers from including the percentage of alcohol on beer labels unless required by state law.[110] In 1987, Coors Brewing Company applied to the federal Bureau of Alcohol, Tobacco and Firearms (BATF) of the Department of Treasury, which administers the Act, for approval of proposed labels and ads that included the percentage of alcohol in its beer. Coors expressed concern about rumors that its beer was weaker than other national brands. The BATF turned down the request on the grounds that it would violate the FAAA and that such advertising and labeling would lead to "strength wars" in which brewers would compete to have the highest alcohol content. The government also argued that such competition would result in more drunkenness and alcoholism and thus more deaths and injuries from drunken driving. Coors then filed suit in U.S. District Court for the

District of Colorado, seeking (a) a declaratory judgment that certain provisions of the FAAA violated the First Amendment and (b) an injunction against enforcement of the provisions regarding labeling and advertising of alcohol content. The district court granted Coors' requests. But the 10th Circuit U.S. Court of Appeals reversed the decision and remanded it to the trial court.[111] The appellate court determined that under the *Central Hudson* test the government had shown a substantial interest in suppressing strength wars, but there had been insufficient evidence presented to determine whether the ban would directly advance the interest. Thus the appellate court remanded the case back to the District Court, which upheld the ban on alcohol content ads but struck down the ban on labels. On appeal, the appellate court affirmed,[112] and the case was appealed to the U.S. Supreme Court, which granted certiorari.

In a unanimous decision written by Associate Justice Clarence Thomas with a separate concurring opinion by John Paul Stevens, the Supreme Court held in *Rubin v. Coors Brewing* (1995)[113] that the statutory provision was unconstitutional. Although the Court agreed with the government that its interest in curbing strength wars was sufficiently substantial to meet the *Central Hudson* test, the Court said the ban failed the third and fourth prongs of the test. The Court concluded that the statutory provision "cannot directly and materially advance its [the government's] asserted interest because of the overall irrationality of the Government's regulatory scheme." The Court noted that, although the provision prohibits disclosure of alcohol content on labels unless state law requires it, federal regulations regarding advertising ban statements about alcohol content only in the 18 states specifically prohibiting such advertising content. Thus the laws regarding labels are at odds with those regarding advertising. As the Court saw it, "There is little chance that 205(e)(2) [the labeling ban provision] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects."

The Supreme Court opinion called the government's evidence *anecdotal* and *educated guesses* regarding the strength wars that would supposedly be fought if the ban were lifted. On the fourth prong of the *Hudson* test, the Court said the regulation was not sufficiently tailored to meet the government's goal. Other options, according to the Court, include directly limiting the alcohol content of beers, banning ads that emphasize high alcohol strength, and limiting the label ban to malt liquors (the market the government believed had the greatest chance of a strength war). The Court suggested that less intrusive forms of the ban might be permitted even though the information being disseminated on the labels and advertisements is truthful information.

In 1996 the U.S. Supreme Court handed down a decision in a case that had the potential to demonstrate just how far the Court was willing to go in protecting truthful commercial speech. Unfortunately, in *44 Liquor Mart v. Racine,*[114] the Court muddied the waters a bit. The case concerned the constitutionality of two Rhode Island statutes.[115] The first law banned the advertising of prices of alcoholic beverages except at the place of sale if sold within the state and so long as the prices were not visible from the street. The second law included a ban on the publication or broadcast of any ads with prices of alcoholic beverages even if for stores in other states.

The purpose of the statutes is to discourage consumption of alcohol and maintain control over traffic in alcohol. 44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc., supported by the Rhode Island Liquor Stores Association, successfully challenged the statutory provision in the Rhode Island U.S. District Court, which held it was a violation of the First Amendment.

The case began in 1991 when 44 Liquormart had to pay a $400 fine for a newspaper ad that did not include the prices of alcohol but included the word "WOW" in large letters next to some pictures of vodka and rum. Since the ad featured low prices for peanuts, potato chips, and mixers, the Rhode Island Liquor Control Administrator, charged with enforcing the statutes, ruled there was an implied reference to bargain prices for alcohol, and thus the law had been violated.

The lower court said there was "no empirical evidence that the presence or absence of alcohol price advertising significantly affects levels of alcohol consumption."[116] On appeal, the First Circuit U.S. Court of Appeals reversed, contending the state's action was reasonable and that "[a]dvertising must be generally productive, or so much money would not be spent on it." The court also noted:

> . . . there would seem to be inherent merit in the State's contention that competitive price advertising would lower prices, and that with lower prices there would be more sales. We would enlarge on this. There are doubtless many buyers whose consumption is sometimes measured by their free money. If a buyer learns that plaintiffs charge less, is he not likely to go there, and then to buy more? Correspondingly, if ignorant of lower prices elsewhere, will he not tend to buy locally, at the higher price, and thus buy less?[117]

The U.S. Supreme Court unanimously reversed, concluding in an opinion written by Justice Stevens that the state had "failed to carry its heavy burden of justifying its complete ban on price advertising." The two statutes and an accompanying state Liquor Control Board Administration regulation violated the First Amendment as applied to the states through the Due Process Clause of the Fourteenth Amendment. Unfortunately, there was no agreement among the justices regarding the appropriate test for making this determination. A plurality of the justices—Stevens, Kennedy, Souter, and Ginsburg—agreed that *Central Hudson* was the correct test.

The plurality agreed that Rhode Island had a substantial government interest in promoting temperance, although noting there was some confusion over what the state meant by *temperance*. The four justices also agreed that even common sense supported the state's argument that a ban on price advertising would elevate prices and that consumption would be lowered as a result. They saw no evidence to support the state's contention that the ban would advance interests in reducing alcohol consumption. The justices said the state could not satisfy the *Central Hudson* requirement that the restriction be no more extensive than necessary.

Chief Justice Rehnquist and Justice Thomas concurred with the Court, but Thomas, in a separate concurring opinion, argued that the *Central Hudson* balancing test should not be applied in commercial speech cases such as this one when "the asserted interest is one that is to be achieved through keeping would-be recipients

of the speech in the dark." Later in his opinion he noted that "all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible." Thomas endorsed the *Virginia Board of Pharmacy* test: "rather than continue to apply a test [*Central Hudson*], a test that makes no sense to me when the asserted state interest is of the type involved here, I would return to the reasoning and holding of *Virginia Pharmacy Bd*."[118]

The Chief Justice said in his separate opinion that he shared Justice Thomas's "discomfort with the *Central Hudson* test." However, he went on to note, "Since I do not believe we have before us the wherewithal to declare *Central Hudson* wrong —or at least the wherewithal to say what ought to replace it—I must resolve this case in accord with our existing jurisprudence."[119] Thus he was making it clear that he was accepting the application of *Central Hudson* only for now. If the Court were to accept Justice Thomas's analysis in future commercial speech cases—although there is no indication at this point that such is likely to happen—there could be a new era for protection for commercial speech, especially that involving truthful speech. Such a change in direction would be particularly interesting in light of *Florida Bar v. Went for It* (1995).[120] Recall that in *Florida Bar* the Court upheld constitutionality of Florida Bar Association rules prohibiting personal injury attorneys from sending direct mail solicitations to victims and families 30 days after an accident or disaster. The Court applied an intermediate level of scrutiny from the *Central Hudson* test and concluded the bar association had substantial interest in protecting (a) the privacy of victims and their families from intrusion of unsolicited contact by lawyers and (b) public confidence in the legal profession.

44 Liquor Mart and *Rubin v. Coors* and *Florida Bar v. Went for It* illustrate the Court's split personality in commercial speech. When the Court is presented with strong scientific evidence—whether surveys or more rigorous research—to demonstrate substantial state interest and effectiveness of a particular law, it is more likely to side with the government.

Fruit, Mushrooms and Beef: A Gourmet Meal or a Mystery Recipe?

From 1997 through 2005, the U.S. Supreme Court handed down three decisions involving *compelled funding for advertising*, in which the federal government assessed a fee among certain food producers to promote and advertise their products. *Glickman v. Wileman Brothers & Elliott, Inc., et al.* (1997)[121] arose when California tree fruit growers, handlers, and processors banded together to attempt to overturn a set of federal administrative regulations that required producers to pay for generic advertising of California peaches, plums, and nectarines. Under the Agricultural Marketing Agreement Act of 1937,[122] the producers were exempted from antitrust laws in their marketing but had to pay an assessment for the expenses of administering the program, which included extensive advertising and promotion.

The respondents initially appealed to the U.S. Department of Agriculture, but the agency upheld the regulations. They then appealed to the U.S. District Court, which ruled in favor of the Agriculture Department. On further appeal, the Ninth Circuit U.S. Court of Appeals reversed, applying the *Central Hudson* test and finding the assessment violated the First Amendment because the generic advertising failed both the second and third prongs of the test. The lower appellate court acknowledged that the government had a substantial interest in improving the sales of peaches, plums, and nectarines, but the court said the government had not proven that such advertising and promotion was more effective than individualized ads in increasing consumer demand for the fruits. The court also indicated that the government program was not narrowly tailored because California was the only state with such a program, which provided no credit to companies that did their own advertising. The court noted from the outset that the First Amendment includes the right not to have to financially support others' speech.

In a 5 to 4 decision written by Justice Stevens, the U.S. Supreme Court reversed the Court of Appeals decision, noting that the lower court had dealt with the wrong issue:

> For purposes of our analysis, we neither accept nor reject the factual assumption underlying the Court of Appeals' invalidation of the program—namely that generic advertising may not be the most effective method of promoting the sale of these commodities. The legal question that we address is whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve.[129]

The Court assumed the latter, pointing out the marketers were gaining considerable economic advantage by being exempt from antitrust laws and the compelled funding was "part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme."[123] The opinion went on to note that there are three characteristics of the regulatory scheme that keep the speech in question from falling into a category protected by the First Amendment that would require the Court to review the case under a heightened standard. First, the Court said, the regulations do not prevent the producers from communicating any message with any audience. In other words, no prior restraint is being imposed. Second, they do not force anyone "to engage in any actual or symbolic speech." The lower appellate court felt the regulations compelled speech because the producers had to pay for the advertising. The Supreme Court saw it differently. The Court said the producers are not forced to endorse "any political or ideological views. . . . Indeed, since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program."[124]

Respondents argued that the assessments violated their First Amendment rights because they had less money to spend for individual advertising, but the Court noted that advertising budgets are often lowered by assessments to cover benefits. "The First Amendment has never been construed to require heightened scrutiny of any

financial burden that has the incidental effect of constraining the size of a firm's advertising budget," according to the Court.[125] The justices had no sympathy for the argument that assessments were a form of compelled speech, noting that they did not force respondents to "repeat an objectionable message," to "use their own property to convey an antagonistic ideological message," or "to force them to respond to a hostile message"[126] when they wanted to be silent. The Court clarified that generic advertising "is intended to stimulate consumer demand for an agricultural product in a regulated market. That purpose is legitimate and consistent with the regulatory goals of the overall statutory scheme."[127]

The general message of the Supreme Court in *Glickman* is that you have no basis for a First Amendment complaint when you benefit economically or otherwise from a regulatory scheme that assesses you for the expenses associated with communicating messages with which you have no disagreement. The First Amendment comes into place, the Court seems to be saying, when you are forced to financially support speech, commercial or otherwise, with which you have ideological or similar differences. Even if you disagree with the use being made of the funds that you have had to pay, you still have no basis for a complaint, according to the Court:

> As with other features of the marketing orders, individual producers may not share the views or the interests of others in the same market. But decisions that are made by the majority, if acceptable for other regulatory programs, should be equally so for promotional advertising.[128]

United States v. United Foods (2001)

Are peaches, plums and nectarines different from mushrooms under the First Amendment? In *United States v. United Foods* (2001),[129] the U.S. Supreme Court tackled this question: are the assessments imposed by the Mushroom Promotion, Research and Consumer Information Act of 1990 on members of the mushroom industry for advertising programs in support of the industry a violation of the First Amendment? In a 6 to 3 decision the Court ruled the Mushroom Act was unconstitutional because the compelled speech was not part of a comprehensive regulatory program and thus was not like the tree fruit industry in *Glickman*. The Court said previous restrictions like this, including those in *Glickman*, were not struck down because the objecting members were required to associate for purposes other than the compelled subsidies for speech. The membership in this case was solely for the advertising itself.

One of the major differences between *Glickman* and *United Foods* is that the United Foods Company wanted to advertise that its brand of mushrooms was better than other brands rather than using the generic advertising promoting all mushrooms that its fellow producers favored. United argued that it was effectively being forced to pay for advertising contrary to the advertising it wanted to do. Is the difference really that substantial? *Glickman* and *United Foods* illustrate the thin line the U.S. Supreme Court draws between compelled versus noncompelled speech under the First Amendment.

Johanns v. Livestock Marketing Association (2005)

Other agricultural goods, including beef, are affected by federal rules similar to those in *Glickman* and *United Foods*. Under the Beef Promotion and Research Act of 1985 (Beef Act), beef ranchers are assessed $1 per head of cattle to fund generic campaigns such as "Beef, It's What's for Dinner." The Beef Act's primary purpose was to create a national policy for promoting and marketing beef and beef products, including setting up a cattleman's Beef Promotion and Research Board (Beef Board). The amount of money involved was by no means peanuts, with more than $1 billion being collected by the Board from 1988 to 2004. In fiscal year 2000 alone, the Board took in more than $48 million.[130] The Livestock Marketing Association and another group responsible for collecting and paying the checkoff, along with several beef farmers and sellers, sued the U.S. Secretary of Agriculture, the Department of Agriculture, and the Beef Board. They claimed the Beef Act and the assessment or "checkoff" on all sales and importation of beef violated the First Amendment by compelling them to subsidize speech with which they disagreed.

The difference between this case and the previous two cases is in the process by which the product is promoted. The government argued that the advertising and promotion involved government speech, not private speech as in *United Foods* (the mushroom case). The Beef Act directed the Agriculture Secretary to appoint the Board, which then convenes an Operating Committee that submits proposals for funding to the Agriculture Secretary who has the final say on each project.

Is beef more like tree fruit or mushrooms? According to the U.S. Supreme Court in *Johanns v. Livestock Marketing Association* (2005),[131] beef is like neither—at least in how its promotional programs are funded and administered. In a 6 to 3 decision authored by Justice Scalia, the Court held that, because the beef checkoff funds the federal government's own speech—not private speech, the scheme does not violate the First Amendment. The Court noted:

> We have sustained First Amendment challenges to allegedly compelled expression in two categories of cases: true 'compelled speech' cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government; and 'compelled subsidy' cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity. We have not heretofore considered the First Amendment consequences of government-compelled subsidy of the government's own speech.[132]

In footnote 2, the Court cited several other programs administered by the Department of Agriculture in a way similar to that for beef, including cotton, potatoes, watermelons, popcorn, peanuts, blueberries, avocados, soybeans, pork, honey, eggs, and lamb. The next First Amendment challenge is highly unlikely to come from any of these food industries, but who will be next in line?

The Federal Trade Commission and Other Federal Agencies

The Federal Trade Commission (FTC) has had a colorful history, marred by battles with Congress, the executive branch, consumer advocates, advertisers, and even within the commission itself. However, it has survived, albeit in a different form than when it was created by Congress in 1914. The Federal Trade Commission Act of 1914 stated: "Unfair methods of competition in commerce are hereby declared unlawful. The commission [FTC] is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce."[133]

Thus the mandate was for the Commission to prevent unfair methods of competition, not to regulate practices that may harm consumers unless such practices affected competition. Most legislation in Congress involves compromises among various interests, and the FTC Act was no exception. Because the U.S. Supreme Court had taken an active role in regulating business with several major decisions on business practices during the early 20th century, advocates on both sides of the regulation coin preferred that a quasi-legislative body or federal agency do the regulating. Both big business, which wanted the trend toward greater monopolization to continue, and antitrust advocates, who pushed for reforms to prevent trade restraint practices, were fearful of the consequences of court intervention, especially from the Supreme Court. Businesses were concerned that certain traditional commercial practices would be restrained or prohibited, whereas antitrust supporters believed the Court would condone or at least refuse to ban anti-competitive trade actions. Both sides lobbied for a federal agency to administer antitrust laws. Unlike today, no consumer activist groups were involved in the lobbying; it was decades before a consumer movement made enough headway to attract the attention of the legislators.

At the same time the FTC Act of 1914 was enacted, Congress also passed the Clayton Antitrust Act,[134] which banned price discrimination, exclusive sales contracts, corporate mergers, inter-corporate stock, and other practices whose effects were to significantly decrease competition or to create a monopoly. The Clayton Act was actually an amendment to the Sherman Antitrust Act of 1890.[135] This prohibited unreasonable interference in interstate and foreign trade, whether by contract and/or conspiracy. The last major revision of the Clayton Act was the 1936 Robinson-Patman Act.[136] This strengthened the Clayton Act by providing severe criminal penalties for businesses that directly or indirectly discriminate in the pricing of similar goods when the impact is to harm competition. It is important to keep this historical background in mind while reviewing FTC regulations on advertising today because the Commission's actions must be evaluated against the backdrop of the 1914 act that created the agency.

The FTC and Deceptive Advertising

The Federal Trade Commission wasted no time after it was created in attacking advertising it deemed deceptive. In 1916 the FTC issued cease-and-desist orders against two companies, both of which advertised clothing made of silk when it was actually made of cotton and other materials.[137] Both companies were charged with engaging in deceptive advertising that resulted in harm either to silk manufacturers or to the silk trade in general. Although the FTC Act makes no mention of deceptive advertising *per se*, the Commission assumed it had authority to ban such advertising. How could the FTC subsume this power? The agency simply characterized deceptive advertising as unfair competition. It was inevitable that, given the blatant abuses of advertising ethics, the Commission would be forced to crack down on deceptive and fraudulent advertising without regard to its effect on the marketplace.

In 1922, the U.S. Supreme Court for the first time found that the FTC had the authority under the 1914 act to directly regulate deceptive ads as an unfair means of competition. In *FTC v. Winstead Hosiery*,[138] the Court upheld a Commission ruling that marketing 10 percent wool underwear as "Natural Wool" and "Natural Worsted" constituted deceptive advertising. The majority opinion, written by Justice William Brandeis, reasoned that deceptive advertising is unfair competition because it wrongly attracts consumers who would otherwise purchase from manufacturers who do not use unethical advertising. There was an assumption that consumers cannot be expected to distinguish dishonest from honest advertising and thereby may succumb to the deceptive entrepreneurs.

By 1930, regulating false and misleading advertising had become the major portion of the Commission's work as advertising grew by leaps and bounds and the marketplace became more confusing for consumers. This was also a time when advertising agencies burgeoned to handle the marketing demand. In 1931, the FTC suffered what initially appeared to be a major setback in its regulatory efforts when the U.S. Supreme Court ruled unanimously in *FTC v. Raladam Co.*[139] that "unfair trade methods are not *per se* unfair methods of competition." The Court held that false and deceptive advertising must be demonstrated to harm the marketplace (such as injuring a competitor). Raladam had advertised a cure for obesity that it claimed was safe, effective, and convenient. The Commission discounted those claims and sought to ban the advertising but made no assertion on appeal that the advertising had been anticompetitive.

Nearly every week the Commission announces it is either taking action against or has reached a settlement with one or more businesses that have engaged in questionable advertising and marketing. For example, in 2005 the Federal Trade Commission announced that Tropicana Products, owned by Pepsico, had agreed to stop claiming that Healthy Heart brand orange juice can lower the risk of heart disease and stroke. According to news reports, the Commission accused Tropicana of deceiving consumers by claiming that two or three glasses of this particular brand of orange juice could substantially lower blood pressure and cholesterol.[140] The company admitted no guilt but agreed to stop such claims in the future.

Other well-known companies have also been FTC targets. In 1997, the Pizzeria Uno Restaurant chain agreed not to misrepresent the fat content or other nutrients in pizzas with baked crusts. This came after the FTC claimed restaurant ads for "low fat" thin crust pizzas were false and misleading.[141] The same year, Jenny Craig, Inc. settled with the Commission regarding charges that it engaged in deceptive advertising with assertions regarding weight loss maintenance, price, and safety in consumer testimonials and endorsements.[142] Three subsidiaries of Quaker State Corp. agreed in the same year to settle charges that ads for Quaker State's Slick 50 Engine Treatment contained false and unsubstantiated statements.[143]

The Wheeler-Lea Amendments (1938): Regulating Unfair and Deceptive Practices

The setback to the Commission's ability to crack down on deceptive ads in the 1930s was only temporary. The FTC quickly began finding that such advertising was unfair competition. In 1938 Congress gave the agency a boost with passage of the so-called Wheeler-Lea Amendments.[144] These amendments to the 1914 FTC Act granted the Commission broad authority over advertising by permitting it to ban "unfair or deceptive acts or practices in commerce." The 1938 amendments were enacted at a time when there was public concern over marketplace abuses, including the tragic deaths that same year of 100 people who had taken a medication known as elixir sulfanilamide. The Massengill Company, without testing, marketed the drug. In 1938 Congress also enacted the Food, Drug and Cosmetic Act creating the Food and Drug Administration (FDA), which still regulates advertising for drugs, cosmetics, and some consumer products.

In 1975 the FTC Act was revised under the Magnuson–Moss Act to include "unfair or deceptive acts or practices in or affecting commerce."[145] This Act also granted the Commission authority to enact trade regulation rules, which have the force of law and can be targeted at specific industries. *Unfair practices* are defined as those that cause or are "likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[146]

FTC Composition and Structure

Like other quasi-legislative, quasi-judicial federal agencies such as the Federal Communications Commission (FCC) and the FDA, the Federal Trade Commission is an independent regulatory agency created by Congress under the authority granted in the Constitution's federal preemption doctrine. There are five commissioners appointed by the President with consent of the Senate for staggered, renewable 7-year terms. The President also designates which member of the five will serve as chair. No more than three commissioners can serve from the same political party. The tradition has been that Presidents appoint the maximum (three) from their political party and then

fill any other vacancies from the other political party with individuals whose views are similar to those of their own. However, Presidents can appoint Independents. For example, Mary L. Azcuenaga, an Independent, was appointed to the commission in 1984 and reappointed to a second term in 1991. Pamela Jones Harbour, also an Independent, was appointed as commissioner by President George W. Bush in 2003. However, such appointments are relatively rare.

The commissioners play a major role in policy and rule making, but the FTC is more than five individuals. There are three bureaus—Competition, Economics, and Consumer Protection—staffed by some 1,200 employees. The Bureau of Competition acts primarily as the agency's antitrust arm, charged with prevention of monopolistic and anticompetitive business practices and anticompetitive mergers. It has the responsibility to investigate alleged violations and make recommendations to the full commission regarding actions. The bureau prepares reports and testimony for Congress and works with the other bureaus and other federal agencies in dealing with anticompetitive practices in areas such as energy for homes and business, prescription drugs and health care, food and high tech industries.[147]

The Bureau of Economics performs three primary functions related to the economic impact of FTC decisions: (a) providing economic advice for enforcement, (b) studying effects of legislative options and regulations, and (c) analyzing market processes.[148] The bureau provided information on telecommunications regulation to Congress when the body was considering the bill now known as the Telecommunications Act of 1996.

The Bureau of Consumer Protection has a mandate "to protect consumers against unfair, deceptive, or fraudulent practices."[149] The Bureau's Advertising Practices Division oversees:

- Claims for foods, drugs, dietary supplements and other products promising health benefits
- Internet health fraud
- Weight-loss ads
- Advertising and marketing directed to children
- Performance claims for computers, Internet service providers and other high tech products and services
- Tobacco and alcohol ads
- Children's online privacy
- Claims about product performance in regional and national mass media, including TV infomercials (program-length commercials), as well as via direct mail to consumers and on the Internet[150]

Infomercials, which frequently appear on late-night cable and satellite television touting everything from cosmetics to miracle car polishes, can easily be mistaken for talk shows because of their format, including a host and a live audience. Since the Federal Communications Commission lifted its limits in 1984 on the percentage of broadcast time that can be devoted to commercials, this form of advertising has flourished.

Other FTC divisions in the Consumer Protection Bureau include *Financial Practices,* which develops policy and enforces laws related to consumer financial and lending practices. The division is also in charge of most of the Commission's consumer privacy programs, including the Fair Credit Reporting Act. The *Division of Marketing Practices* enforces laws against fraudulent marketing practices such as Internet and phone scams, deceptive telemarketing, pyramid sales schemes, and investment scams. The division also enforces the Telemarketing Sales Rule (banning deceptive sales calls and "abusive, unwanted, late-night sales calls") and the Funeral Rule (requiring funeral home directors to disclose prices and other details about their services). The *Division of Enforcement* ensures compliance with FTC orders and enforces various trade regulation rules, guidelines and statutes.[151]

The FTC maintains headquarters at 6th Street and Pennsylvania Avenue N.W. in Washington, DC, with regional offices in Atlanta, Chicago, Cleveland, Dallas, Los Angeles, New York, San Francisco, and Seattle. The staff sizes at regional offices are relatively small compared to the main office, but each regional office usually handles thousands of complaints each year and can initiate investigations that can ultimately lead to a full-scale investigation by the national office.

FTC Modes of Regulation

Investigations

The Federal Trade Commission has a wide range of legal options in its regulation and enforcement activities. The most common are *investigations, consent agreements, trade regulation rules, cease and desist orders*, and *civil and criminal penalties*. *Investigations* are particularly important tools for FTC enforcement. Contrary to popular opinion, the FTC and other similar federal agencies do not need hundreds or thousands of complaints about a company or practice before they can take action. In fact, the FTC does not need even a single complaint but can instead begin an investigation based solely on information from a news story, a congressional inquiry, or some other credible source. When the agency decides to conduct an investigation, it will first determine whether to publicly announce its intentions or to conduct its work in private. Investigations are usually nonpublic.[152]

Most investigations are initiated by FTC regulatory staff members without formally seeking approval of the full commission, which concentrates its efforts on policy making and major enforcement activities. Because of its rather limited resources, the FTC tends to follow the "squeaky wheel gets the grease" principle—the most flagrant abuses get the most attention. Most investigations die at an early stage but those that survive often take considerable time. If an investigation reveals unfair and deceptive practices by an individual or industry, the staff can then recommend that the full commission take action. The most serious type of initial action is a formal hearing before an administrative law judge or ALJ. The ALJ conducts the hearing under formalized procedures similar to those in a court of law, with each side given an opportunity to present its case following rules of evidence and rules of procedure. The ALJ's decision can be appealed to the full commission, which can exercise its

discretion in the matter by rejecting the appeal or ordering a hearing. If the defendant loses and does not appeal to the full commission, the FTC can take appropriate legal action such as issuing cease-and-desist orders, fines, or criminal prosecution. The commission can always overrule the ALJ decision, of course. If a defendant's appeal is rejected by the commission, and after hearing, rules against a defendant, the defendant can appeal the decision to the U.S. Court of Appeals for the circuit in which the defendant resides or does business or in the circuit where the alleged illegal act occurred.

Cease-and-Desist Orders

A *cease-and-desist order* (CDO) issued by the FTC is legally enforceable and prohibits an individual or company from committing a particular act against which an order has been issued. A 1944 FTC case illustrates how this order works. From 1934 to 1939, Charles of the Ritz Distributing Corporation marketed a line of cosmetics, including a Rejuvenescence Cream with sales of about $1 million. In an extensive national advertising campaign, the company claimed the cream contained "a vital organic ingredient" along with "essences and compounds" that "restores natural moisture necessary for a live, healthy skin." The ad also said, "Your face need know no drought years" and that the cream gave the skin "a bloom which is wonderfully rejuvenating" and is "constantly active in keeping your skin clear, radiant, and young looking."[153] In light of some of the hype and puffery that bombards us in advertising, such claims may seem mild. But the FTC ruled, after a hearing, that the advertising was false and deceptive. It issued a CDO prohibiting Charles of the Ritz from using the word *rejuvenescence* or similar terms to describe its cosmetics in any advertising and from representing in any ads that the cream would rejuvenate the skin or restore youth or the appearance of youth to the skin. The company appealed, but the U.S. Circuit Court of Appeals upheld the FTC order.

A cease-and-desist order constitutes prior restraint, but the courts have consistently permitted the FTC and federal agencies to issue such orders so long as a fair hearing is conducted. CDOs are powerful weapons in the FTC arsenal, but they are often time-consuming and expensive. Thus the commission usually attempts other forms of enforcement whenever feasible.

Consent Agreement or Order

A *consent agreement or order* is a relatively painless way of settling disputes over advertising or marketing practices for which the commission believes a company's claims have been deceptive or misleading. If the advertising or practice appears to be fraudulent, it is unlikely the FTC will seek a consent agreement because of the seriousness of the offense. The process is quite simple. The agency staff conducts its usual investigation, which may be brief or protracted. If the evidence points toward deception but it appears little or no harm has occurred to consumers or competitors, the FTC may negotiate a voluntary settlement with the company or business under which it agrees to halt the advertising or practice in dispute. This is in return for the agreement by the FTC not to pursue the case further, assuming no other violations appear.

The company or business does not have to admit it violated the law. If it agrees to the terms, the FTC presents an affidavit to its legal representative to sign that assures the ads or practice will be halted. By far, the majority of cases decided by the FTC after an investigation result in a consent agreement or order. Most companies are glad to sign on the dotted line because fighting such accusations can be extremely time-consuming and expensive. It is not unusual for the FTC and the company in their public relations releases and announcements to both emphasize that the consent decree does not imply nor indicate the company has been guilty of any violations. It is merely that the parties have agreed that the advertising or practice in question has ended.

The consent agreement has the same legal effect as an order and thus can be enforced under a threat of contempt. Failure to comply will almost certainly subject the company to a formal hearing and possible fines and other legal sanctions. Thus it is very rare when a company defies a consent decree. The risks of prosecution are simply too high. Under a consent decree, the company agrees to entry of a *final order* and waives all rights to judicial review, i.e., appeals to a court. The commission has to publish the order and allow at least 60 days for public comment before making the order final.

Sometimes the FTC finds it necessary to file suit against a company before a settlement can be reached. In December 2005 the commission announced it had reached a settlement with satellite TV provider DirecTV to pay a $5.335 million fine—the largest civil penalty in the history of the FTC in a consumer protection case—for violating the do-not-call provisions of the FTC's Telemarketing Sales Rule (TSR) beginning in October 2003.[154] According to the complaint filed by the U.S. Department of Justice for the FTC in U.S. District Court in Los Angeles, the company hired five telemarketing firms to make cold (unsolicited) calls to consumers who were listed on the Do Not Call (DNC) Registry. According to the commission, at least one of the companies also made calls to consumers who had specifically asked not to receive calls from DirecTV and made "abandoned calls" (calls in which the consumer is not connected to a live sales representative within two seconds after the consumer completes his or her greeting), both practices that are illegal under the TSR. As part of the settlement, DirecTV agreed to terminate any marketer of its products and services that the company knows or should know is violating the TSR and to extensively monitor marketers of its products and services. The consent order also included civil penalties of $25,000 and $50,000 against two of the companies and $205,000 and $746,000 against two other companies, but the latter fines were suspended because the companies were unable to pay them.[155]

Around the same time as the DirecTV settlement, the commission also announced it had reached a consent settlement with three companies and their owners for an alleged pyramid or multi level marketing scheme. The agreement included about $1.5 million in consumer redress, including fines and $600,000 to be paid by the defendants' insurance company.[156]

As an administrative agency, the Federal Trade Commission has the authority to seek preliminary or permanent *injunctions* whenever it appears that a particular practice could cause immediate and irreparable harm to the public or to another

business. In the latter case, however, the harmed business is more likely to seek the injunction in court on its own rather than indirectly through the FTC because the indirect route can take considerable time. Usually, the FTC will go the CDO or consent agreement route rather than seek an injunction because the former techniques are quite effective in halting deceptive and misleading advertising and practices.

Trade Regulation Rules

Although much of the enforcement by the FTC is conducted on a case-by-case basis, there are instances in which enforcement is better served by what are often called nonadjudicatory procedures. The most common of these is the *Trade Regulation Rule* (TRR). TRRs provide specific prohibitions on certain practices that are binding on all businesses for whom the rule was designed. Any violation of a TRR can be grounds for an unfair or deceptive act or practice that can subject the offender to civil and even criminal penalties. Although the commission first promulgated TRRs in 1962, its first major and certainly controversial TRR was a requirement in 1964 that all cigarette packaging carry a health warning. That TRR was followed five years later by a requirement that octane ratings be posted on all gasoline pumps. A number of other TRRs have been proposed by the FTC over the years, some of which were eventually promulgated but others died or were substantially weakened by the time the rule-making process was complete.

The following are some of the surviving TRRs that have made direct or indirect impacts on commercial speech:

- **Appliance Labeling** requires disclosure of energy costs or effIciency of home appliances and heating and cooling systems.
- **Games of Chance in the Food Retailing and Gasoline Industries**—requires disclosure of the odds of winning prizes, the random distribution of the winning prize pieces, and publication of the winners' names.
- **The Retail Food Store Advertising and Marketing Practices Rule**, as amended, requires advertised items to be available for sale unless the store notes in the ad that supplies are limited or the store offers a rain check.
- **The Mail or Telephone Order Merchandise Rule** requires businesses to ship mail or telephone purchases when promised or within 30 days if no promise is made.
- **The Used Car Rule** requires dealers to put a buyer's guide on each vehicle with details regarding the warranty and other information.
- **Funeral Rule** requires funeral homes to disclose prices and other information about funerals and services.
- **Telemarketing Sales Rule** requires telemarketers to disclose information that could have an impact on a consumer's decision to buy before he or she agrees to pay for any goods or services.[157]

Some proposed FTC trade regulation rules have brought considerable fire from the industries to be affected and political pressures from Congress. The most notable of these is the commission's recommendation in the late 1970s to prohibit all television advertising directed toward children. This proposal led to an ensuing battle among the commercial TV executives, television critics, and Congress. Congress responded by enacting the Federal Trade Commission Improvement Act in 1980.[158] This Act expanded sanctions available for violation of FTC regulations and broadened the civil remedies available to the courts in cases brought by the commission. It barred the FTC from enacting any TRRs directed at children's TV commercials. The act also limited the FTC's use of funding for consumer groups in FTC cases and required the commission to consider costs versus benefits before issuing rules.

The Act now requires that the FTC enact TRRs only when there is a pattern of deceptiveness evident in the industry, not simply on the basis that the advertising may be unfair. Certainly the most telling provision of the Act was the one creating a legislative veto of any FTC rule if within 90 days of issuance of the rule, both houses of Congress vote against the rule. This legislative veto power was ruled unconstitutional by the U.S. Supreme Court in *Immigration and Naturalization Service v. Chadha* (1980)[159] and thus no longer affects the FTC nor other similar federal agencies.

The Issuance of Trade Regulation Rules

How are TRRs issued? First, the FTC conducts an investigation of trade practices within that particular industry. If the staff uncovers evidence of unfair or deceptive practices such as misleading advertising, the commission can formally initiate the rule-making proceeding. Second, the staff writes a proposed trade regulation rule that is then reviewed by the full commission, which may accept it as is, modify it, or kill it altogether. Third, if a proposed rule is approved for further consideration (not for enactment), a notice is published in the *Federal Register* indicating that a hearing is to be conducted on the proposal and giving the time and location of the hearing. The notice will also indicate the issues to be considered, provide instructions for groups and individual consumers on how to participate, and reprint the text of the proposed rule. Fourth, a hearing or series of hearings is conducted. Not all of the hearings need to be held in Washington; some may take place at any of the FTC regional offices. All formal hearings are open to the public. The press representatives of consumer groups and individual citizens are typically permitted to testify at the hearings. Anyone may file written comments with the commission for consideration with all evidence presented at the hearings, in staff reports, and in the presiding officer's report (the officer is usually a member of the FTC staff versed in procedures). Under rules of the 1975 Federal Trade Commission Act still in effect, if there are disputed issues of material fact, the commission must permit cross-examination of individuals whom the FTC believes to be appropriate and necessary for a full disclosure of the facts.[160]

The full commission then votes on whether to implement the rule as is, to modify it, or to reject it. If it chooses to modify or accept it as is, affected consumers and

businesses have the right to appeal the commission's decision in any appropriate U.S. Court of Appeals, including the D.C. Circuit, but the appeal must be filed within 60 days from the time the rule takes effect.

Advisory Opinions

Other non-adjudicatory procedures used by the FTC are *advisory opinions, industry guides,* and *consumer education.* Whereas most state courts and all federal courts are prohibited from issuing advisory opinions, most state and federal agencies, including the FTC, routinely issue such opinions. One of the key limits on FTC advisory opinions is that they can be issued only for contemplated actions, not for actions already taken. For example, if a dog food manufacturer wanted to know whether it could advertise and market a new line of dog food as "Premium Lite" that contains 15 percent fewer calories than its regular "Premium," it would ask for an advisory opinion so any potential litigation could be avoided. The company would file a written request with the commission describing the advertising under consideration. The FTC legal staff would then review the letter and issue an opinion based on current FTC policy, rules and regulations.

All such advisory opinions become public record and can be used by other advertisers in similar situations. If the advertiser follows the advice in good faith, it cannot be sued by the FTC unless the FTC enacts new rules, which would, of course, require public notice in the *Federal Register*, or the commission decides to rescind its approval, which requires written notification to the party. The FTC will not issue advisory opinions when substantially similar action is part of an official proceeding conducted by the FTC or other agency, when there is ongoing investigation in that area or if issuing an opinion would require lengthy investigation, research or testing.[161]

Industry Guides

While advisory opinions are geared toward businesses and corporations, industry guides are intended to regulate practices of entire industries. For example, the FTC has issued industry guides for the jewelry, precious metals, and pewter industries and for environmental marketing and alternative fueled vehicles. Dozens of these often complex and detailed guides have been issued over the decades for products and services from eyeglasses to health care services. Any business that violates an industry guide faces potential litigation because failure to comply is evidence of unfair or deceptive trade practices.

Consumer Education

Consumer education has been the least controversial of the FTC's nonadministrative functions because these efforts rarely single out a particular business or industry for criticism except when blatant violations are involved. The FTC publishes a wide variety of materials and makes use of press releases, interviews, press conferences, and other public relations techniques to reach consumers. The commission issues dozens of free and inexpensive booklets for business and for consumers on topics such as the Telemarketing Sales Rule, e-commerce and the Internet, franchise and

business opportunities, telemarketing, privacy, identity theft, investments, credit, automobiles, energy and environment and diet, health and fitness.

The FTC is responsible for enforcing its rules and also enforcing specific consumer protection statutes through which Congress has delegated its authority to the commission. These include a broad range of federal laws from the Hobby Protection Act (which requires imitation coins, medals, and similar items be clearly marked "copy" and imitation political items to be marked with the year of manufacture) to the Magnuson–Moss Warranty Act of 1975.[162] This Act requires manufacturers and sellers to disclose warranty information to potential purchasers before they buy consumer products included under the act. The FTC is also responsible for enforcing the Truth-in-Lending Act, the Fair Credit Reporting Act, the Wool Products Labeling Act, the Telemarketing Sales Rule, the Pay-Per-Call Rule and the Equal Credit Opportunity Act.

Corrective Advertising

Prohibiting misleading and deceptive advertising is a way to protect consumers and ensure fair competition, but outright bans are not always effective or appropriate. Requiring affirmative disclosure can sometimes be an effective remedy. Although the original FTC Act and its revisions make no mention of affirmative disclosure, which usually comes in the form of corrective advertising, the federal courts have generally upheld the right of the FTC to impose requirements on advertisers. As the cases attest, some of the largest corporations have been forced by the commission to modify advertising to include corrective statements.

For example, the Warner-Lambert Company was ordered by the FTC in 1975 to clearly and conspicuously disclose in its next $10 million of advertising for Listerine antiseptic mouthwash: "Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity." Listerine had claimed in its advertising that it could prevent, cure, or alleviate the common cold. On appeal, the U.S. Court of Appeals for the DC Circuit held in 1977 in *Warner-Lambert v. FTC*[163] that the commission did "have the power to issue corrective advertising in appropriate cases" but that the preamble, "Contrary to prior advertising," was unwarranted, given the facts in the case. Thus for the next several years, all Listerine print ads and radio and television commercials carried the disclaimer, "Listerine will not help prevent colds or sore throats or lessen their severity."

The FTC complaint against Warner-Lambert was initially filed in 1972 even though Listerine had advertised since 1921 that it would help colds. After four months of hearings at which some 4,000 pages of documents were produced and 46 witnesses testified before an administrative law judge, the ALJ ruled against Warner-Lambert. The company appealed to the full FTC, which basically affirmed the ALJ's decision in 1975. During the next two years, Listerine continued to make the claims until the U.S. Court of Appeals upheld the commission's decision with modification. The U.S. Supreme Court denied certiorari in 1978.[164] Listerine was able to make presumably false assertions for 57 years, including 6 years after the complaint was filed.

The first successful attempt by the FTC to impose an order for corrective advertising came in 1971,[165] the year before the complaint against Listerine was filed. The ITT Continental Baking Company had advertised that Profile Bread could help reduce weight because it contained fewer calories than other similar brands of bread when, in fact, the bread was sliced somewhat thinner than normal and contained only seven fewer calories per slice than "ordinary" bread. ITT was ordered to spend at least 25 percent of its advertising budget for the following year indicating in its ads that Profile Bread contained only 7 fewer calories than other breads and that this difference would not cause a significant weight reduction.

Other successful FTC efforts to require corrective advertising include Ocean Spray Cranberries, which agreed in 1972 after an FTC complaint to spend 25 percent of its ad budget for a year informing the public that the term "food energy" used in previous ads referred to calories rather than vitamins and minerals.[166] On rare occasions, the FTC is rebuffed in its push for corrective advertising. In 1978 the U.S. Court of Appeals for the Seventh Circuit held that an egg industry group, the National Commission on Egg Nutrition (NCEN), could not be forced in future advertising or public statements to mention the relationship between egg consumption and heart and circulatory disease. It said, "[M]any medical experts believe increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease."[167] The NCEN, in response to what the FTC described as "anticholesterol attacks on eggs which had resulted in steadily declining per capita egg consumption,"[168] mounted an advertising and public relations counterattack claiming that eggs were harmless and were necessary for human nutrition. For example, some of the advertising asserted that eating eggs does not increase blood cholesterol in a normal person and there is no scientific evidence that egg consumption increases the risk of heart and circulatory disease. The FTC ordered the NCEN to not only stop making such claims but to also issue corrective advertising, as noted.

The U.S. Court of Appeals held that the FTC could prohibit the trade association from disseminating what the commission determined to be false, misleading claims. But the group could be required to issue corrective advertising "only when NCEN chooses to make a representation as to the state of the available evidence or information concerning the controversy [over the connection between egg consumption and increased blood cholesterol and heart disease]."[169] There had been no history of deception, as there had been in *Warner-Lambert v. FTC* (1977) and the original FTC order was broader than necessary to prevent future deception.

Affirmative Disclosure

The Federal Trade Commission has used two other major remedies for deceptive advertising—affirmative disclosure and substantiation. It is not unusual in a consent order or a cease-and-desist order for the commission to require that an advertiser not only refrain from making specific claims but also require that all future advertising make certain disclosures designed to prevent deception, that is, *affirmative disclosures*.

A classic case involving affirmative disclosure is the mid-1960s order by the FTC that the J. B. Williams Co., the distributor of Geritol, state in its commercials that "tiredness and that run-down feeling" were rarely caused by iron-poor blood, which the product claimed to cure. Geritol advertised heavily on network television, including the "Ted Mack Original Amateur Hour," that its "iron-rich formula" (primarily vitamins and iron) would cure "iron-poor blood." The ads were particularly aimed at women, who medical experts agree generally need more iron in their diets. As the FTC saw it, the ads failed to mention that Geritol would help only those rare individuals who suffered tiredness as a result of iron deficiency. Geritol was simply a vitamin and iron supplement, not a cure for tiredness. J. B. Williams appealed the FTC order, but the Sixth Circuit U.S. Court of Appeals in 1967 upheld the order.[170] The Geritol story did not end. Six years later the commission fined the company more than $800,000 for allegedly violating a cease-and-desist order, but the Sixth Circuit U.S. Court of Appeals in 1974 ordered a jury trial, at which the company was ordered to pay $280,000 in fines.[171] An example of an affirmative disclosure requirement by Congress rather than the FTC is the set of federal statutes regarding cigarette and smokeless tobacco advertising.

Substantiation

The Federal Trade Commission uses *substantiation* as a mechanism to regulate advertising. The FTC substantiation program began in 1970 when the commission filed a complaint against Pfizer, Inc.,[172] the manufacturer of Un-Burn, an over-the-counter, nonprescription medication for minor burns and sunburn. The product, which was advertised extensively on radio and television, claimed that it "actually anesthetizes nerves in sensitive sunburned skin" and that it "relieves pain fast." The FTC complaint alleged that the claims and similar ones for Un-Burn had not been substantiated.[173] The commission charged that Pfizer had engaged in unlawful deception and unlawful unfairness in violation of Section 5 of the FTC act.

Unlike other regulatory mechanisms, such as corrective advertising and affirmative disclosure, substantiation essentially places the burden of proof on the advertiser to show that there is scientific evidence to support the particular claim. In other words, the advertiser is forced to prove the truth of the assertions rather than the FTC being forced to prove they are false, as would be the case in a typical complaint for false and deceptive advertising. If a case were to go to trial, the FTC would have the burden of showing that no scientific evidence existed to substantiate the claims. But this could be effectively accomplished with the testimony of expert witnesses and by showing that the advertiser had failed to provide substantiation if requested. Substantiation cases at the FTC have been relatively rare, primarily because a complaint cannot be filed unless the advertiser makes an affirmative product claim without a reasonable basis for that claim, based on adequate and well-controlled scientific tests or studies. This standard, which continues today, does not require that the evidence be overwhelmingly in favor of the product or even that the bulk of the evidence favors the claims. The advertiser simply has to demonstrate that there is a reasonable basis for making the claims. As the FTC noted in the Pfizer decision:

> The question of what constitutes a reasonable basis is essentially a factual issue which will be affected by the interplay of overlapping considerations such as (1) the type and specificity of the claim made, e.g., safety, efficacy, dietary, health, medical; (2) the type of product, e.g., food, drug, potentially hazardous consumer product, other consumer product; (3) the possible consequences of a false claim, e.g., personal injury, property damage; (4) the degree of reliance by consumers on the claims; (5) the type and accessibility of evidence adequate to form a reasonable basis for making the particular claims.[174]

Suppose you saw the following ad in your local newspaper:

> $49.00 OVER FACTORY INVOICE*
> EVERY NEW CAR ON OUR LOT
> MOORE MOTORS
> MAIN STREET
> HOMETOWN, HOMESTATE
> * Dealer invoice may not reflect dealer cost.

If you visited the dealership, what price would you expect to pay for a new car? Forty-nine dollars more than the dealer paid for the car from the distributor? Forty-nine dollars more than the base vehicle price? Forty-nine dollars above the base vehicle price plus the dealer's cost for accessories? Suppose the disclaimer (indicated by the asterisk) said instead: Invoice price indicates the amount dealer paid distributor for car. Due to various factory rebates, holdbacks and incentives, actual dealer cost is lower than invoice price. Does the latter disclaimer give you a better idea of how to determine how much you would pay for the car in relation to the "actual dealer cost"?

A Fifth Circuit U.S. Court of Appeals tackled these questions in *Joe Conte Toyota Inc. v. Louisiana Motor Vehicle Commission* (1994).[175] The Louisiana Motor Vehicle Commission, which has the authority to regulate automobile dealer advertising in the state, promulgated a set of rules and regulations banning the use of the term "invoice." The regulations were designed to stop misleading ads. In 1985 the Supreme Court of New Jersey upheld a similar ban on the use of "invoice" and "dealer invoice."[176] Joe Conte Toyota sought unsuccessfully in U.S. District Court to have this particular provision (section 20) declared a violation of First Amendment rights. It should be noted that the Toyota dealer did not use any ads that violated the rules but was seeking to have the ban declared unconstitutional so it could, if it so chose, include "invoice" in its ads. Joe Conte submitted a proposed ad, very similar to the first one above, and an alternate proposed ad that had a disclaimer like the second one above.

As you recall from an earlier discussion, under the first prong of the *Central Hudson* test for commercial speech, which we have here, a court must first determine that the expression concerns lawful activity and is not misleading before applying the next three prongs of the test. If the expression is misleading, it simply does not have First Amendment protection. The trial court dismissed the complaint filed by Joe Conte Toyota on the ground that the term "invoice" was inherently misleading

in the context of both of the proposed ads. The testimony in the district court did little to bolster the dealer's complaint. One car dealer with 10 years in the business indicated that "invoice" had little meaning because "invoice price" changed over time and from dealer to dealer. Another dealer said "$49.00 over invoice" was basically meaningless for the consumer. Even a sample invoice from Joe Conte Toyota itself revealed four different invoice prices:

> "[A] base vehicle price at dealer's cost of $14,190.00, a base vehicle price with accessories at dealer's cost of $16,407.30, a total vehicle price with advertising expense, inland freight and handling at dealer's cost of $16,929.30, and a net dealer invoice amount of $16,860.00."[177]

The U.S. Court of Appeals had little trouble deciding, upholding the constitutionality of the commission's regulation and thus affirming the judgment of the lower court. Noting that it agreed with the reasoning of the New Jersey Supreme Court in its 1985 decision, the court said:

> . . . We are satisfied that the proposed advertising copy with the suggested alternative disclaimers is inherently misleading. Because there is ample evidence on the record to support the district court's finding that the use of the word 'invoice' in automobile advertisement [sic] is inherently misleading, its conclusion that the commercial speech in question fell beyond First Amendment protection was not in error. Consequently, there was no need for the court to consider the remaining prongs of the *Central Hudson* test.[178]

Regulation by Other Government Agencies

Although the Federal Trade Commission is the main federal agency responsible for regulating advertising, other federal agencies possess authority to regulate specific types of advertising under certain conditions and state and local government agencies are also involved in the process. The federal agencies include, but are not limited to, the Federal Communications Commission (FCC), the U.S. Postal Service (USPS), the Food and Drug Administration (FDA), the Department of the Treasury, and the Securities and Exchange Commission (SEC). The role of the FCC in regulating broadcast ads, such as its eventual successful attempt to restrict the amount and type of advertising in TV programs to children, is discussed in the next chapter.

The FDA traces its origins to 1927 when the federal Bureau of Chemistry was reorganized into two units—the Food, Drug and Insecticide Administration and the Bureau of Chemistry and Soils. Three years later, the Food, Drug and Insecticide Administration was renamed the Food and Drug Administration. The FDA, an agency of the Department of Health and Human Services (formerly the Department of Health, Education, and Welfare), regulates the advertising of certain foods, prescription and nonprescription drugs, and cosmetics, as provided under the Federal

Food, Drug and Cosmetic Act of 1938, as amended. The Food and Drug Administration Act of 1988 placed the FDA under the Department of Health and Human Services with oversight by a Commissioner of Food and Drugs.[179]

The FDA advertising regulations are significantly stronger than those of the FTC. In 1958 Congress approved the Food Additives Amendment requiring manufacturers of new food additives to demonstrate their safety.[180] In the same year the FDA published the first list of almost 200 substances *generally recognized as safe* (GRAS).[181]

Prescription drugs are evaluated by the National Research Council Drug Efficacy Group of the National Academy of Sciences; if a drug is rated less than "effective," the rating must be included in any advertising. All claims in drug advertising regulated by the FDA must be backed by appropriate clinical studies conducted by experts. In 1995 the FDA issued a series of proposed reforms to streamline regulations on the manufacturing of pharmaceuticals, including broadening how manufacturers can promote and advertise approved uses of drugs to health professionals. The FDA was yielding to pressure from prescription drug marketers, consumers (including groups representing AIDS sufferers), and politicians. The FDA also eased the rules regarding the length of time a drug must be tested prior to marketing.

Until 1997 advertising for prescription drugs was restricted primarily to professional publications such as medical and nursing journals. That all changed with the Food and Drug Administration Modernization Act of 1997 under which the FDA eased rules on television and radio advertising of prescription drugs. The new rules allow companies to directly promote a prescription drug's benefits so long as the ads list a toll-free phone number, Internet address, or other means for obtaining information about side effects and risks.[182] Print ads were not affected by the regulations.

By 2005 the amount the pharmaceutical industry was spending on advertising directed at consumers had risen to more than $5 billion.[183] According to a study published that year in the *Journal of the American Medical Association*, when patients ask their physicians for specific prescription drugs they have seen in commercials, the doctors are more likely to prescribe the drugs.[184] Given that earlier research had found that such advertising stimulated consumers to ask for the advertised drugs,[185] this finding is not surprising.

The FDA occasionally gets involved in advertising for other types of products including foods when health claims are touted. In 1997 the agency promulgated a regulation on advertising low-fat, high-fiber foods made from rolled oats, oat bran, and oat flour such as Quaker Oats and General Mills' Cheerios. If foods contain enough soluble fiber, the advertising can claim they are heart-healthy and may reduce the risk of heart disease when they are part of a low-fat diet. This was the first time the FDA allowed a company to assert that a food could help prevent disease.[186]

The other agencies mentioned play a fairly minor role in regulating advertising. The USPS regulates advertising sent via mail but, despite its rather broad authority over such advertising, tends to confine its efforts to blatantly unfair, misleading, and fraudulent cases. Some of this reluctance may be attributed to privacy considerations, but limited resources and deference to the FTC may also explain its conservative approach. The USPS has always been aggressive in prosecuting certain con

artist schemes that seem to never die, such as chain letters and “envelope stuffing” job “opportunities” (“make hundreds of thousands of dollars simply by stuffing envelopes in your own home”). The SEC regulates the advertising of stocks, bonds, and other traded securities, whereas the Treasury Department is responsible for enforcing federal statutes regarding the reproduction of paper currency in ads.

Although the great bulk of advertising involves or affects interstate commerce and thus can be regulated by the FTC and other federal agencies, there are exceptions that fall into the regulatory hands of state and local agencies. Because the FTC does not have exclusive control over advertising, ads that cross state lines can under some circumstances be regulated by a state or local agency. A mail order house based in State X advertising in newspapers, on network TV and radio, on local stations, and through the mail could find the FTC overlooking its national ads. The FCC may review broadcast commercials, the state consumer protection agency regulating the ads in the local newspapers and the USPS keeping an eye on mail ads. If the company sells prescription drugs or securities, the picture would be more complicated.

Most states have enacted what have become known as “little FTC acts” or statutes creating state consumer protection agencies modeled after the FTC. Many of these statutes include provisions regarding advertising such as “bait and switch” (deceptive ads in which a low-priced model of a product convinces consumers to visit, then a salesperson persuades them to purchase a high-priced model because the lower-priced one is “sold out” or “not worth it”).

Self-Regulation

In an ideal marketplace, consumers would regulate advertising by refusing to buy products that did not live up to their promises and expectations and thus make their distaste known to the manufacturers. Products and services that did not satisfy consumers would thus fade into oblivion. Individual self-regulation does not always work even though most advertisers are honest and make concerted efforts to please. Government regulation is not always effective. To fill the gap as well as to head off government intervention whenever possible, advertisers have established various self-regulatory boards over the years that review and evaluate ads either on a voluntary or, in some cases, nonvoluntary basis. The most powerful of self-regulatory groups was not founded until 1971, but it has become an important broker in advertising.

National Advertising Review Council

In 1971 three major advertising associations—the American Advertising Foundation (AAF), the American Association of Advertising Agencies (AAAA), and the Association of National Advertisers (ANA)—and the Council of Better Business Bureaus (CBBB) created a National Advertising Review Council (NARC) “to foster truth and accuracy in national advertising through voluntary self-regulation.” The NARC was given the responsibility of setting up the rules for the National Advertising Division (NAD), the Children’s

Advertising Review Unit (CARU), and the National Advertising Review Board (NARB). The NAD regularly monitors national ads appearing in all of the major media.

If the NAD determines that an ad may be false, misleading or deceptive or makes unsubstantiated claims, an investigation is conducted. Investigations can also be initiated on the complaint of another advertiser, consumer group, individual, or local Better Business Bureau. During the investigation, the advertiser is given the opportunity to respond to the allegations. If the NAD concludes that some action is warranted, it will request that the advertiser take the recommended steps, whether they be (a) to cease further advertising that may be misleading, deceptive, or false, (b) to modify future advertising to delete certain claims, or (c) to take some other action.

An NAD decision is not necessarily final. The advertiser can always refuse to comply because the NAD has no governmental authority, or the advertiser can appeal to the NARB. The NARB then selects an ad hoc panel of five individuals to hear the appeal. The NARB also hears appeals from the CARU, which is financed by the children's advertising community. Council membership fees fund NAD and NARB. The NARB upholds the decisions of the NAD, but occasionally will overturn a decision.

Both the NAD and the NARB derive much of their persuasive power from the fact that their parent organization, the CBBB, has considerable clout in the marketplace. Decisions by the NARB cannot be appealed further, but the NARB has no punitive power. The NAD, however, makes very effective use of media publicity to inform consumers about companies that engage in false and misleading advertising. Should an advertiser decide to ignore an NAD/NARB decision, the NAD can always register a complaint with the FTC or other appropriate federal agency.

The Children's Advertising Review Unit, which focuses on advertising directed toward children, was created in 1974 and operates in a manner similar to the NAD. Each major commercial television network (NBC, CBS, ABC and Fox) has its own network advertising standards. The networks, for example, refused to carry brand-name commercials for condoms because such advertising violated these codes. In addition, the AAAA requires all members to abide by its Standards of Practice that ban unfair, deceptive, and misleading advertising.

Advertising Ethics and Other Considerations

Although some cynics might argue that advertising ethics is an oxymoron, this is an area of advertising that deserves more attention, especially in the current era of deregulation. Professional associations such as the AAF and AAAA have standards or codes that attempt to articulate ethical standards of their members. Yet some questionable techniques and practices creep through in ads of even some of the largest and most reputable corporations. No doubt some of these can be linked to the rigors of competition, but competition is only part of the equation.

Ads occasionally appear in major newspapers, including Sunday inserts, for indoor TV 'dish' antennas. The ads typically include claims that would be difficult to prove false but could confuse or mislead some consumers:

- The [model] looks like an outdoor satellite 'dish,' but works indoors like ordinary 'rabbit ears.'
- "Legal in all 50 states. You pay no cable fees because you're NOT getting cable. You pay NO satellite fees because you're NOT using satellite technology or service.

All of these claims are true. Rabbit ear antennas have never been illegal, and purchasers certainly will not get cable or satellite TV with this antenna. They will not have to pay for something they will not get. Other claims are also silly, e.g., "It works entirely with 'RF' technology . . . to pull in all signals on VHF and UHF from 2 to 82." All receiving antennas use RF technology. RF means radio frequency. Every antenna "pulls" signals out of the air. The ad notes that the antenna "complies with all applicable federal regulations." There are none governing indoor antennas. The "sheer aesthetic superiority of its elegant parabolic design" is presented as "a marketing breakthrough."

In other words, the advertiser thinks the dish looks good and makes a good marketing device. The advertised price for one antenna is 30 percent higher, thanks to an added $3.00 for shipping and handling. Assertions that there is a limit of "three per address" and that the company reserves "the right to extend above time and quantity guarantees" are equally dubious. Readers who order the antenna probably will not be surprised to get solicitations to order more. The clincher in the ad is the free "Basic Guide to Satellite TV" included with all orders, presumably so buyers can learn about all services "from Disney to XXX movies" that they won't get with the rabbit ears but could receive with a real satellite dish system. By the way, a nice set of rabbit ears (without the parabolic design) can be purchased at Radio Shack and similar stores for $10 and up.

Puffery

Certain examples of a common advertising technique are known as *puffery* or evaluative advertising. The FTC and other federal and state agencies permit puffery so long as such exaggerations do not cross the line and become factual statements that could materially affect an individual's decision to purchase a product. These agencies assume that consumers do not take such claims seriously, and yet some of the most popular brands of products from toiletries to automobiles can trace their dominant market shares to extensive advertising using puffery. Examples include:

No one has a better chance of winning our contest than you. [Translation: Everybody who enters has the same chance of winning or losing.]
The best time to buy [a computer].
An unbelievably rich and creamy treat [low-fat ice cream].
. . . ends dry skin [skin lotion].
. . . bleach makes your wash clean, fresh and wonderful.
Rich, satisfying taste [cigarettes].
Exercise takes a lot out of you. Orange juice puts a lot back.
Introducing the freshest tomato taste [pasta sauce].
Big discounts every day [discount department store].

These claims can influence consumer decisions, but it is unlikely that any of them would be challenged by the FTC or any other regulatory agency. Puffery, in its traditional form (best, number one, preferred, highest quality, best performer, most economical, lowest-priced, none better, freshest, best tasting, etc.), is an accepted marketing practice that probably causes little harm to consumers, although it conveys little, if any, useful information to a rational consumer.

Testimonials

Another persuasive technique that has become commonplace in advertising in the last few decades, especially in television commercials, is the testimonial or paid endorsement by a well-known personality. Celebrities such as Britney Speers, Halle Berry, and Tiger Woods receive substantial compensation for endorsing products. They would not be hired if their endorsements did not improve sales. Until 1975, the FTC rules were lax regarding testimonials, although the commission has had guidelines for endorsements for many years. The industry guides adopted in 1975[187] focus on endorsers, not company spokespersons. The difference between a spokesperson and an endorser is significant—endorsers are well-known personalities—professional athletes, TV and movie stars, and former politicians—experts or individuals who can claim expertise in a particular area because of experience, education, special training, or a combination thereof.

The guidelines require that a personality or expert be a regular user of the endorsed product and the advertising featuring the endorsement is discontinued if the product is not used by that individual. Guidelines also require that any financial interest by the endorser in the company be disclosed. The guidelines do not require an advertiser to disclose that personalities or experts were paid for testimonials. There is an assumption that consumers know individuals are compensated so there is no need to repeat this fact in every ad. A spokesperson does not have to meet these standards. TV or radio announcers for a headache remedy do not have to actually use the medication. They are simply serving as professional announcers, not endorsers or experts.

Tobacco and Alcohol Advertising: Some Legal and Ethical Issues

Should media outlets refuse to carry questionable advertising and advertising in poor taste? Newspapers and other print media clearly have the right to refuse any and all advertising, thanks to the 1974 U.S. Supreme Court decision in *Miami Herald v. Tornillo*.[188] In this case the Court held that a Florida statute giving political candidates a right of access to editorial space in newspapers that had criticized them or endorsed an opposing candidate was unconstitutional. Now with the death of the Fairness Doctrine, broadcasters presumably can refuse any advertising, except political ads covered by the Equal Opportunities Rule that guarantees candidates for federal office the right to purchase broadcast advertising during certain times.

Washington Post columnist Jane Bryant Quinn has criticized the practice of some newspapers that "stubbornly publish work-at-home schemes and offers of loans to bad credit risks, even though they are hardly ever legitimate. Get-rich-quick channels on some cable TV systems are especially bad."[189] Quinn noted that the largest newspaper trade group, the American Newspapers Publishers Association, has no set of voluntary guidelines for advertising and sees no need. She pointed out that the broadcast trade group, the National Association of Broadcasters, once had advertising standards (under a "Code of Good Practice") but they were killed in 1983 when the Justice Department filed an antitrust suit against some of the standards.[190]

Tobacco and tobacco products advertising has been one of the most controversial areas of commercial speech. Tracing its origins all the way back to 1612 when Englishman John Rolfe grew tobacco in Jamestown, Virginia, tobacco has been a commercial enterprise in the U.S. for almost four centuries.[191] By the 1920s more than a billion cigarettes were sold annually.[192] One of the most important events in the history of tobacco occurred in 1964 when the U.S. Surgeon General issued an official report, directly linking smoking with cancer, heart disease, and other illnesses. Five years later, the U.S. Congress enacted a statute banning advertising for cigarettes and small cigars in all electronic media and designating the Federal Communications Commission as the enforcement agency.[193] The ban took effect in 1971 and was immediately challenged on First Amendment grounds, not by the tobacco industry, but instead by individual broadcasters and their trade association, the National Association of Broadcasters. In *Capital Broadcasting Co. v. Mitchell* (1971),[194] a three-judge district court panel ruled against the broadcasters, holding there was no First Amendment infringement and citing the "unique characteristics of electronic communication that make it subject to regulation in the public interest." Ads for smokeless tobacco in electronic media were banned in 1986.[195]

In 1992 in *Cipollone v. Liggett Group, Inc.,*[196] the U.S. Supreme Court struck another blow against tobacco advertising when it held that the Public Health Cigarette Smoking Act of 1969 did not prohibit suits at common law for fraudulent misrepresentation in tobacco advertising. The next major event in the series arose in 1993 when the staff of the Federal Trade Commission recommended that the agency ban ads for Camel cigarettes that included the cartoon character known as "Old Joe" or "Joe Camel." Studies showed that even young children associated the humped-back character with Camel cigarettes. Within three years after Joe appeared, the illegal sales of Camels to children under 18 reportedly rose from $6 million to a whopping $476 million a year.[197] A 1993 study by the federal Centers for Disease Control and Prevention in Atlanta found that the three most heavily advertised cigarette brands—Camel, Marlboro, and Newport—controlled 86 percent of the market for smokers aged 12 to 18, compared to only 35 percent of the overall market. According to that survey, 3 million adolescents smoked 1 billion packs of cigarettes a year.[198] Another study—this time in the February 23, 1994 *Journal of the American Medical Association*—found that the Virginia Slims "You've Come a Long Way, Baby" campaign persuaded 11- to 17-year-old girls to smoke. Tobacco

companies were also criticized for sponsoring auto races as a means of bypassing the TV ban on cigarette commercials.[199]

In 1993, a year in which R.J. Reynolds spent $42.9 million in major market advertising for Camels, the FTC voted 3 to 2 to end the investigation, saying there was no evidence to support claims that children were lured to smoke by the campaign, temporarily accepting the arguments of the tobacco industry. U.S. Surgeon General Joycelyn Elders, among other prominent individuals, urged the agency to stop the ads. R.J. Reynolds was by no means off the hook as result of the FTC decision. In 1994 the U.S. Supreme Court denied *certiorari* in an appeal from Reynolds seeking to halt a suit filed against it by San Francisco lawyer Janet Mangini in a California trial court.[200] Mangini sought a permanent injunction against Joe Camel ads and sought to force the company to pay for a national anti-smoking campaign for children. The firm unsuccessfully argued in its appeal that federal law preempted state law in such a case.

In 1995 the U.S. Food and Drug Administration sent a series of proposals to then President Bill Clinton for regulating nicotine as a drug. One part of the report concluded that the FDA had the authority to regulate nicotine and tobacco under the Food, Drug and Cosmetic Act as "drug delivery devices." The recommendations fell far short of what tobacco critics wanted. But the agency did recommend outlawing cigarette vending machines, banning use of cartoon characters in advertising, and restricting tobacco ads in magazines with substantial youth readerships. Even small steps created controversy. The then Speaker of the House Newt Gingrich's (R-Ga.) reaction to the report was that the FDA had "lost its mind." The FDA left the implementation of the recommendations to the White House and Congress, where there was strong resistance to any restrictions.

In 1997, the first set of regulations aimed at reducing use of cigarettes and smokeless tobacco among adolescents took effect.[201] The regulations required retail stores to check photo IDs before selling cigarettes or other tobacco products to anyone under the age of 27. They imposed a ban on all outdoor advertising within 1,000 feet of public playgrounds, including those at public parks, elementary and high schools. The FTC had earlier charged that the Joe Camel advertising campaign violated federal law in inducing young people to smoke, resulting in significant harm to their health and safety.[202] The commission minced no words in its allegations against the R.J. Reynolds Tobacco Company, saying the Joe Camel campaign was so successful the percentage of children who smoked Camels eventually outgrew the percentage of adults who smoked the brand. According to the FTC, the company "promoted an addictive and dangerous product through a campaign that was attractive to those too young to purchase cigarettes legally."[203]

In the same month the FDA regulations were promulgated, a group of state attorneys general, health advocates representing 46 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, American Samoa, the Northern Mariana Islands, and Guam began negotiations with trial lawyers representing the tobacco companies. On November 23, 1998, the five largest tobacco manufacturers (Brown & Williamson, Lorillard, Philip Morris, R.J. Reynolds, and Liggett & Myers) signed an agreement

under which they would pay the states more than $206 billion over 25 years and accept restrictions on advertising and marketing. When the agreement was reached, four states (Florida, Minnesota, Mississippi, and Texas) had already settled with the manufacturers for $40 billion. Under the agreement, known as the "Attorneys General Master Settlement Agreement":[204] (1) no cartoon characters such as Joe Camel are permitted in tobacco ads; (2) all transit and outdoor tobacco ads, including those on billboards, and tobacco company sponsorships of concerts, team sports and events with a significant youth audience are outlawed; (3) payments promoting tobacco products in movies, TV shows, theater productions, and live performances are banned; and (4) the use of tobacco brand names for stadiums and arenas is prohibited. Mississippi Attorney General Michael Moore (not to be confused with the filmaker of the documentary *Sicko*) led the battle against the industry that resulted in the national settlement, and his state was the first to settle on its own after the proposal was hammered out. And what was the payout? Almost $3.6 billion.[205]

In 1996, after the FDA exercised what it thought was its authority to regulate tobacco products as drugs and devices under the Food, Drug and Cosmetic Act of 1938, the tobacco industry challenged the agency's authority in court. The U.S. District Court sided with the FDA, but the Fourth Circuit U.S. Court of Appeals reversed, holding that Congress had not granted such authority. On further appeal, the U.S. Supreme Court in *Food and Drug Administration v. Brown & Williamson Tobacco Corp. et al.* (2000)[206] upheld in a 5 to 4 decision the lower appellate court ruling. The Supreme Court said that, reading the Act as a whole as well as in the context of later federal tobacco legislation, it was clear that Congress had not delegated the FDA authority to regulate tobacco products as drugs and devices. Soon thereafter, the FDA backed away from its earlier decision, revoking its tobacco regulations.

Just as the legal issues associated with tobacco advertising are troublesome and problematic, so are the ethical issues. According to internal memos leaked in 1994, the third largest cigarette manufacturer, Brown & Williamson Tobacco Corp. of Louisville, paid more than $950,000 between 1979 and 1983 to have its brands featured in more than 20 movies. Sylvester Stallone of *Rocky* fame received at least $300,000 and stars such as Paul Newman and Sean Connery also benefited, according to the memos.[207] These movies were seen by millions of teenagers too young to legally smoke.

The ethical question is: *why do many of the mass circulation magazines that have broad readership among young people accept cigarette advertising, knowing the ads are likely to in uence young people to smoke and harm their health?* The research on cigarette advertising clearly points in the direction of strong effects of ads on children. For example, a study by Richard Pollay of the University of British Columbia, published in 1996 in the *Journal of Marketing,* found that, on average, when a cigarette brand increased its advertising expenditures by 10 percent, its market share among adults went up 3 percent but its market share among teen smokers jumped as much as 9 percent.[208] According to the Campaign for Tobacco-Free Kids, every day more than 2,000 children in this country become new, regular daily smokers.[209] The campaign particularly criticized the marketing of flavored cigarettes such as "Kauai

Kolada," "Twista Lime," Camel "Winter Warm Toffee" and "Winter MochaMint," and Kool "Caribbean Chill," "Midnight Berry," and "Mocha Taboo." One smokeless tobacco company is marketing flavors such as wintergreen, apple blend, and cherry. The campaign has also criticized Brown & Williamson for promoting its Kool brand with hip-hop music themes, and images.[210] At least one major magazine, *Reader's Digest*, has had a policy for decades that prohibits cigarette and other tobacco product ads, and yet it has continued to be profitable. The *Digest* has few media followers. It is ironic that TV viewers will not see any tobacco ads on television because of the congressional ban, and yet full-page ads for cigarettes pop up as they search their television guides. In 1997 tobacco companies in Japan decided to stop advertising on television, radio, movies, and the Internet, while increasing advertising in magazines and newspapers.[211]

Alcohol advertising has also drawn fire for allegedly catering to youths. A study in the *American Journal of Public Health* by Joel Grude and Patricia Madden showed that beer ads affect children's beliefs about drinking. The research could not demonstrate that the ads affected their later behavior. The survey of fifth and sixth graders found that children are extensively exposed to alcohol advertising and they associate drinking with "romance, sociability and relaxation."[212]

In 2005 new rules banning all tobacco advertising in newspapers and magazines and on the Internet took effect in the 15 member-countries of the European Union.[213] The ban also applies to international sporting events. In 2003 Britain, home of three of the largest tobacco companies in the world, effectively banned all tobacco advertising.[214] In 2007, Bob Iger, CEO of the Walt Disney Company, publicly pledged that all Disney movies, including those produced by Touchstone and Miramax, would no longer portray smoking. He also indicated that the company would begin including anti-smoking public service announcements in theaters and on DVDs. About the same time, the Motion Picture Association of America said smoking would be considered in setting movie ratings.

The ethical issues surrounding alcohol and tobacco advertising may or may not clash with First Amendment principles, depending upon which side of the issue the speaker falls. In light of *Central Hudson* and *Coors* and *44 Liquormart*, some of the proposed limitations would probably meet the standards for restricting commercial speech while others would not. Self-regulation is not likely, if the past is any indication, unless the industries feel they have no choice, short of government regulation. So far few major media outlets have dealt with the ethical concerns beyond publicizing them in news stories. Should newspapers and magazines, for example, adopt policies barring alcohol and tobacco ads that are likely to attract the attention of children? Should TV and radio stations consider such restrictions for alcoholic beverages? The study found 685 alcohol commercials in 443 hours of televised sporting events but only 25 public service announcements on the dangers of alcohol during the same time.[215]

In 1996, in a move heavily criticized by government officials and children's advocacy groups, the Distilled Spirits Council of the United States (DISCUS), a trade association for distillers, announced that it was lifting its voluntary ban on the

advertising of so-called "hard liquor" (vodka, scotch, rum, whisky, gin, bourbon, etc.) on radio and television.[216] The ban, which many people mistakenly assumed had been imposed either by Congress or the FCC, took effect for radio in 1936 and for television in 1948.[217] It never affected wine and beer commercials, which have been freely broadcast for decades. The ban had actually already been violated earlier in 1996 when the Seagram Co. began carrying ads for its Crown Royal Canadian and Chivas Regal Whisky on a Texas TV station.[218] The ads were responses to years of declining sales.

All four of the major commercial networks—ABC, CBS, NBC, and Fox—refused to change their policies prohibiting such advertising, but many local stations including network affiliates and several cable companies were more than happy to accept the ads. One major cable company, Continental Cablevision Inc., accepted the commercials but restricted them to airing from 10:00 p.m. to 2:00 a.m. The then FCC Chair, Reed Hundt, urged in vain for the industry to continue the voluntary ban,[219] and President Bill Clinton had particularly harsh words for the action of the trade association, asking to no avail that the FCC study the effects of liquor advertising.[220] Hundt called the decision to lift the ban "disappointing for parents and dangerous for our kids."[221] More than a year after it broke the voluntary ban, Seagram began inserting six-second disclaimers at the beginning of its ads such as "People of legal drinking age should enjoy alcohol responsibly, but don't drink if you're under 21."[222]

According to a study published in the *Journal of the American Medical Association* in 2003, some magazines that attract a sizeable number of teenagers such as *Rolling Stone, Sports Illustrated*, and *People* are likely to contain more advertising than other magazines for liquor and beer.[223] According to the study comparing the advertising content of 35 magazines, for each increase of 1 million readers 12 to 19 years old, a magazine typically had about 60 percent more beer and liquor ads.[224]

Other Ethical Issues

In 1997 the *Wall Street Journal* shook the rafters of the magazine publishing industry with a story that detailed how numerous magazine advertisers, including Chrysler, Ford Motor Co. and Colgate-Palmolive Co., insisted that publishers provide them advance notice of potentially controversial articles so they could pull their advertising if they felt it appropriate.[225] Many publishers apparently comply with the requests because they simply cannot afford to lose a major advertiser. The problem is that the traditional separation between the advertising and editorial departments breaks down when an advertiser demands prior notice of editorial content.[226] Whether editorial content suffers will vary from magazine to magazine, but there are serious ethical issues involved when a corporation refuses to purchase advertising in a publication unless the publisher gives it advance notice. Advertisers have every right to pick and choose the publications in which they advertise, but should they be permitted to muck with editorial content? If nothing else, readers' perceptions about a magazine and its credibility could be adversely affected if they are led to believe that advertisers can dictate content.

Another controversial issue that has emerged in recent years is the extent to which advertising is sneaking into the mass media, including television, radio and movies in the form of product placements. With digital video recorders (DVRs), TiVo, and other devices that skip TV commercials, now in common use in the home advertisers are having a tough time getting through to viewers. According to *Time* magazine, the percentage of households using electronic devices to skip TV commercials rose from 0 in 2000 to an expected 40 percent by 2008. At the same time, the amount advertisers were spending on product placement on TV rose from about $1 billion in 2000 to an expected $4 billion in 2008.[227] Reality shows such as *The Apprentice* and *Survivor* have been particular favorites for product placement. Another new twist on advertising is the so-called "word-of-mouth" radio endorsement in which DJs are paid to plug specific brand products and services in what appear to be spontaneous discussions. One ad agency in Atlanta, for example, specializes in such advertising. Most listeners are unaware they're hearing advertising. For example, two morning show co-hosts might converse for a few minutes between songs about the brand of detergent they used over the weekend to clean their cars or what fast food chain they plan to drop by for lunch later in the day. There are no FCC rules or regulations that ban such advertising nor that prohibit radio hosts from being paid to do such plugs.

Even video games have become a market for advertisers. For example, Jeeps have been placed in Tony Hawk's Underground 2 game, and Pizza Hut appears in the online Everquest II game.[228] Some games—"advergames"—are devoted primarily to promoting a particular product.

Finally, some research indicates that anti-smoking ad campaigns not only do not work but may actually increase smoking, at least among young people. For example, a 2007 study found that the more middle school students see such ads, the more likely they are to smoke.[229]

Summary and Conclusions

With advertising expenditures continuing to rise annually in this country, commercial speech has become an important avenue for exercising First Amendment freedoms. Indeed, the mass media, as we know them today in the United States, could not survive without the continued influx of advertising revenues. Even traditionally noncommercial forms of mass communication, such as public radio and television, have come to rely on advertising, albeit in the form of brief spots and support acknowledgments. The protection granted commercial speech by the courts, particularly the U.S. Supreme Court, has expanded since the unenlightened days of *Valentine v. Chrestensen* (1942). This is thanks to the advances forged in *New York Times v. Sullivan* (1964), *Bigelow v. Virginia* (1975), *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (1976), and progeny as well as cases involving religious speech such as *Watchtower Bible and Tract Society v. Village of Stratton* (2002).

Central Hudson Gas and Electric Corp. v. Public Service Commission (1980) did provide us with a four-part test for determining whether a particular type of commercial speech has First Amendment protection. U.S. Supreme Court decisions such as *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico* (1986), *Shapero v. Kentucky Bar Association* (1988), *Board of Trustees of the State University of New York v. Fox* (1989), and *Peel v. Attorney Registration and Disciplinary Commission of Illinois* (1990) have clarified *Central Hudson*'s test and created confusion about its use. Like it or not, the Supreme Court will continue to face commercial speech cases in a variety of contexts until a strong majority on the Court is able to flesh out *Central Hudson* or create a clearer test for determining the scope of constitutional protection for commercial speech. The nondecision in *Nike v. Kasky* (2003) illustrates this struggle of the Court to articulate clear guidelines regarding how much protection commercial speech enjoys. The Court could always reverse itself and grant commercial speech the same protection as political and religious speech, but that is still unlikely to occur anytime soon.

Coors (1995), *44 Liquormart* (1996), and *Thompson v. Western States Medical Center* (2002) are positive signs that the U.S. Supreme Court is willing under certain circumstances—especially when truthful information is involved that may assist consumers in making marketplace decisions—to broaden First Amendment protection for commercial and corporate speech. But, as *Florida Bar v. Went for It* (1995) and *Glickman* (1997) demonstrate, there are times when the Court will draw the line and find no First Amendment violation when commercial speech is restricted even though the Court would have ruled differently if the speech had involved political or religious content. *Glickman* is troubling because the Court rejected *Central Hudson* as the appropriate test for determining whether a compelled contribution to support a campaign was constitutional. The Court made clear the First Amendment does not bar all compelled contributions to fund advertising, particularly when the advertising does not promote a message with which the contributor disagrees.

Four years later in *United States v. United Foods* (2001), the Court ruled that a statute similar to that in Glickman but regulating mushrooms instead of tree fruit was unconstitutional. The Court said the compelled speech was not part of a comprehensive regulatory program and thus was not like the tree fruit industry in *Glickman*. According to the Court, previous restrictions like those in *Glickman* were not struck down because the objecting members were required to associate for purposes other than the compelled subsidies for speech. In *Johanns v. Livestock Marketing Association* (2005), the Court held that imposing an assessment on all sales and importation of cattle did not violate the First Amendment because the assessment funded the federal government's own speech—not private speech. The difference in this case was that the decisions on expenditures were made by a committee, half of whose members were appointed by the U.S. Secretary of Agriculture and all of whose members could be removed by the Secretary. *Glickman, United Foods*, and *Johanns* illustrate the thin line the U.S. Supreme Court draws between compelled versus noncompelled speech under the First Amendment.

Although the Supreme Court determines the scope of protection granted to various forms of commercial and corporate speech including advertising, federal and state agencies such as the Federal Trade Commission execute day-to-day regulations. The FTC has the most impact on advertising regulation, but state and local agencies share in the process. Congress and the state legislatures also play an important role by enacting specific statutes, usually to restrict or prohibit certain types of advertising. Finally, self-regulation such as that by the National Advertising Division and the National Advertising Review Board does work to eliminate false, misleading, and deceptive advertising, even though these entities have no governmental authority and thus must rely on volunteer cooperation from advertisers and pressure from adverse media publicity to halt such advertising.

Unfortunately, such advertising continues to appear in major newspapers and magazines and on TV and radio. Self-regulation typically weeds out only the most blatant and egregious abuses, and government enforcement is only a few steps ahead of self-regulation. The media must impose stricter ethical standards for advertising or consumer confidence in advertising will erode. Because the mass media are never required to accept any particular ads except political ads by broadcasters, there is no rationale for publishing questionable ads even when they may allow media to avoid prosecution. Higher ethical standards for all forms of advertising would lead to more informed and rational consumers, which would, in the long run, benefit rather than harm the mass media. Tobacco and liquor advertising pose special problems because research indicates that young people are influenced by such messages, even to the point of illegally using the products.

Endnotes

1. *See* Shannon McCaffrey, *Supreme Court to Hear Case of Nike's Free Speech*, Lexington (Ky.) Herald-Leader (Knight Ridder Washington Bureau), Jan. 11, 2003, at A9.
2. *See* Jeffrey L. Fisher, *Nike v. Kasky: Will the Shield of the Commercial Speech Doctrine Become a Sword?* Comm. Law. Winter 2003, at 28.
3. *Kasky v. Nike*, 45 P.3d 243 (Cal. 2002).
4. *Id.*
5. *Id.*
6. *Supreme Court Considers Nike Commercial Speech Challenge*, News Media Update (electronic e-mail), vol. 9, no. 9 (May 5, 2003).
7. *Nike v. Kasky*, 539 U.S. 654, 123 S.Ct. 2554, 156 L.Ed.2d 580, 31 Med.L.Rptr. 1865 (2003).
8. *See Nike Settles Controversial First Amendment Case*, Reporters Committee for Freedom of the Press (press release), Sept. 15, 2003.
9. *See* www.fairlabor.org.
10. *Valentine v. Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262, 1 Med.L.Rptr. 1907 (1942).
11. *Id.*
12. *Jamison v. Texas*, 318 U.S. 413, 63 S.Ct. 920, 86 L.Ed. 1262, 1. Med.L.Rptr. 1907 (1943).
13. *Id.*
14. *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943).
15. *Id.*

16. *Martin v. City of Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943).
17. *Douglas v. City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943).
18. *Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2003).
19. *Id*.
20. *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 1 Med.L.Rptr. 1527 (1964).
21. *Id*.
22. *Id*.
23. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).
24. *Pittsburgh Press Co. v. The Pittsburgh Commission on Human Relations*, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669, 1 Med.L.Rptr. 1908 (1973).
25. *Id*.
26. *Id*.
27. *Id*.
28. *Id*.
29. *Id*.
30. *Bigelow v. Virginia*, 421 U.S. 809, 96 S.Ct. 2222, 44 L.Ed.2d 600, 1 Med.L.Rptr. 1919 (1975).
31. *Id*.
32. *Id*.
33. *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 13 S.Ct. 1505, 123 L.Ed.2d 99, 21 Med.L.Rptr. 1161 (1993).
34. *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 62 S.Ct. 3028, 106 L.Ed.2d 388 (1989).
35. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346, 1 Med.L.Rptr. 1930 (1976).
36. *Id*.
37. *Id*. (Rehnquist dissent).
38. *Id*.
39. Cited in Betsy Querna, *Pressure from Patients*, U.S. News & World Rep., May 9, 2005, at 68.
40. Jisu Huh, Denise E. DeLorme, and Leonard Reid, *The Information Utility of DTC Prescription Drug Advertising*, 81 Journalism Q. 788 (2004).
41. *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977).
42. *Id*.
43. *Hugh Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675, 2 Med.L.Rptr. 1935 (1977).
44. *Griswold v. Connecticut*, 381 U.S. 497, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).
45. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707, 3 Med. L.Rptr. 2105 (1978).
46. *Consolidated Edison Co. v. Public Service Commission of New York*, 444 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319, 6 Med.L.Rptr. 1518 (1980).
47. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341, 6 Med.L.Rptr. 1497 (1980).
48. *Consolidated Edison Co.*
49. *Id*.
50. *Red Lion Broadcasting v. Federal Communications Commission*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371, 1 Med.L.Rptr. 2053 (1969).
51. *Central Hudson Gas & Electric Corp.*
52. *Id*.

53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed. 2d 469 (1983).
58. 39 U.S.C. §3001(e)(2).
59. *Bolger v. Youngs Drug Products Corp.*
60. *Id.*
61. *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810, 2 Med.L.Rptr. 2097 (1977).
62. *Virginia State Board of Pharmacy.*
63. *Bates v. State Bar of Arizona.*
64. *Id.*
65. *Id.*
66. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978).
67. *In Re Primus,* 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978).
68. *Id.*
69. *Id.*
70. *In re R. M. J.*, 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982).
71. The bar rules permitted attorneys to send such announcements only to "lawyers, clients, former clients, personal friends and relatives."
72. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985).
73. *Id.*
74. Kentucky Rules of the Supreme Court SCR 7.03.
75. *Shapero v. Kentucky Bar Association*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988).
76. *Id.*
77. Curriden, *Making Airwaves*, A.B.A. J. 38, 40. (July 1989).
78. Kentucky Rules of the Supreme Court, SCR 3.130–7.01 *et seq.*
79. *Id.*
80. *Id.*
81. *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990).
82. *Attorneys and Advertising: Yellow Pages and Red Tape?,* Yellow Pages Update, July–August 1988, at 6.
83. *Id.*
84. *Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy*, 512 U.S. 136, 114 S.Ct. 2084, 129 L.Ed.2d 118 (1994).
85. *Id.*
86. *Florida Bar v. Went for It, Inc. and John T. Blakely*, 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541, 23 Med.L.Rptr. 1801 (1995).
87. *The Florida Bar: Petition to Amend the Rules Regulating the Bar-Advertising Issues*, 571 So.2d 451 (Fla. 1990).
88. Interestingly, the Court mentions that the attorney in the original suit was disbarred before the case reached the U.S. Supreme Court for reasons unrelated to the case. Another lawyer was then substituted for the appeal.
89. Florida Bar Rules of Professional Conduct 4-7.4(b) and 4-7.8(a).
90. *McHenry v. Florida Bar*, 808 F.Supp. 1543 (M.D. Fla. 1992).

91. *McHenry v. Florida Bar*, 21 F.3d 1038 (11th Cir. 1994). We characterize the appellate court as "reluctantly" affirming because the U.S. Supreme Court said in its decision, "The panel [11th Circuit] noted, in its conclusion, that it was 'disturbed that Bates and its progeny require the decision' that it reached".
92. *Florida Bar.*
93. *Id.* (Kennedy dissent).
94. *Florida Bar.*
95. *Id.*
96. *Friedman v. Rogers*, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979).
97. *American Medical Association v. Federal Trade Commission*, 638 F.2d 443 (2d Cir. 1980).
98. *American Medical Association v. Federal Trade Commission*, 455 U.S. 676, 102 S.Ct. 1744, 71 L.Ed.2d 546 (1982).
99. *Thompson v. Western States Medical Center*, 535 U.S. 357, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002).
100. *Id.* (Thomas concurrence).
101. *Id.*
102. *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266, 13 Med.L.Rptr. 1033 (1986).
103. *44 Liquor Mart v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711, 24 Med. L.Rptr. 1673 (1996).
104. *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico.*
105. *Id.* (Brennan dissent).
106. *Id.*
107. *Board of Trustees of the State University of New York v. Fox.*
108. *Id.*
109. *Id.*
110. *See* Federal Alcohol Administration Act, 49 Stat. 977, 27 U.S.C. 201 §5(e)(2).
111. *Adolph Coors Co. v. Brady*, 944 F.2d 1543 (1991).
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113. *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532, 23 Med.L.Rptr. 1545 (1995).
114. *44 Liquor Mart v. Racine*, 39 F.3d 5, 22 Med.L.Rptr. 2409 (1st Cir. 1994), *rev'g*, 829 F.Supp. 543, 553 (D.R.I. 1993); *44 Liquor Mart v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711, 24 Med.L.Rptr. 1673 (1996).
115. R.I. Gen. L. §3-8-7 and 2-8-8.1. At dispute also was Regulation 32 of the Rhode Island Liquor Control Administration.
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121. *Glickman, Secretary of Agriculture v. Wileman Brothers & Elliott, Inc., et al.,* 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997).
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129. *United States v. United Foods*, 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001).
130. *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005).
131. *Id.*
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135. 15 U.S.C. §1-7 (1890).
136. 15 U.S.C. §13 (1936).
137. *Federal Trade Commission v. Yagle*, 1 F.T.C. 13 (1916) and *Federal Trade Commission v. A. Theo. Abbot & Co.*, 1 F.T.C. 16 (1916).
138. *FTC v. Winstead Hosiery*, 258 U.S. 483, 42 S.Ct. 384, 66 L.Ed. 729 (1922).
139. *FTC v. Raladam Co.,* 283 U.S. 643, 51 S.Ct. 587, 75 L.Ed. 1324 (1931).
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141. FTC File No. 962 3150 (1/22/97).
142. FTC File No. D9260 (5/29/97).
143. FTC File No. D09280 (7/23/97).
144. 52 Stat. 111 (1938).
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147. *See* http://www.ftc.gov/bcp/conline/pubs/general/guidetoftc.htm.
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150. *Id.*
151. *Id.*
152. *Id.*
153. *Charles of the Ritz Distributing Corp. v. FTC*, 143 F.2d 676 (1944).
154. *See* "DirecTV to Pay $5.3 Million Penalty for Do Not Call Violations" at http://www.ftc.gov/opa/2005/12/directv.htm. *U.S. and the Federal Trade Commission v. DirecTV* (2005).
155. *Id.*
156. *See* "Alleged Pyramid Scheme Operators Banned from Multi-level Marketing" at http://www.ftc.gov/opa/2005/12/trekall.htm. *Federal Trade Commission v. Trek Alliance. Inc., et al.* (2005).
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173. *Id.*
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176. *Barry v. Arrow Pontiac, Inc.,* 100 N.J. 57, 494 A.2d 804 (1985).
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